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MASSACHUSETTS REPORTS

194

CASES ARGUED AND DETERMINED

IN MASSACHUSETTS IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

JANUARY 1907 — MARCH 1907

HENRY WALTON SWIFT

REPORTER

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OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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HON. JOHN WILKES HAMMOND.
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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

CHARLES E. LEWIS, administrator, *vs.* BROTHERHOOD ACCIDENT COMPANY.

Suffolk. December 12, 1905. — January 4, 1907.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Insurance, Accident. *Contract*, Validity, Construction. *Arbitrament and Award. Fraternal Beneficiary Corporation. Evidence*, Circumstantial. *Practice, Civil*, Exceptions.

A policy of accident insurance, called a certificate, contained an express promise to pay a certain sum of money to the estate of the insured in case of his death from one of the causes named, and also contained an express promise to pay to the insured in case of injury certain sums varying with the extent of his injury. These promises were made subject to the by-laws of the company and the conditions attached to the policy which were numerous, and neither the by-laws nor the conditions contained any provision for arbitration. At the end of the policy, immediately before the attesting clause, was the following provision: "In the event that this company and the certificate holder or beneficiary disagree as to the liability of this company under this certificate, it is agreed, and this certificate is issued upon the express condition, that such liability and the amount thereof shall be determined by arbitration." Then followed a provision as to the persons of whom the board of arbitrators should consist. *Held*, that the provision quoted was an agreement to refer to arbitration questions of liability arising under other provisions of the contract, and was void as an attempt to oust the courts of their jurisdiction.

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In construing doubtful provisions of a policy or certificate of insurance the insured is to be given the benefit of the doubt, and this rule is particularly applicable where the contract of insurance incorporates numerous and complicated conditions.

A policy or certificate of accident insurance was stated to cover drowning as well as bodily injuries produced by external, violent and accidental means, of which many were enumerated. There was also a provision that "In the event of any accidental bodily injury, fatal or non-fatal, contributed to or caused by" a large number of enumerated events, the limit of liability in case of death should be only one twentieth of the death benefit provided for in the policy. The event producing this reduction of liability in case of drowning was described as follows: "drowning or shooting when the facts and circumstances of the accident and injury are not established by the testimony of an actual eye witness; and also when in an alleged drowning (shipwrecks at sea excepted) the body is not recovered and identified;" followed, immediately after the semicolon, by the clause "and in case of injuries whether fatal or disabling of which there is no visible mark on the exterior of the body visible to the eye (the body itself in case of death not to be deemed such mark)." *Held*, that the last quoted provision, referring to external marks of contusions and wounds, applied only to the more violent causes of injury and not to the case of death by drowning; *also*, that the provision in regard to the testimony of an actual eye witness did not require that such eye witness should have seen the drowned person go under water, but that convincing circumstantial evidence of the drowning proved by eye witnesses of the circumstances was sufficient to comply with the requirement. *Whether*, such a requirement is void as an attempt to impose a rule of evidence upon the courts, was not considered.

The rule, that under the statutes relating to fraternal beneficiary corporations a certificate in such a corporation cannot be made payable to the estate of the insured and thus subject a death benefit to the payment of his debts, does not apply to a policy or certificate made payable to the estate of the insured "in trust however for and to be paid over forthwith to his legal heirs," as the real beneficiaries are the heirs at law and the money when recovered goes to them.

A requirement of a policy of accident insurance that in case of the death of the insured by accidental drowning, in order to recover the full amount of the policy, the facts and circumstances of the accident must be established by the testimony of an actual eye witness, is satisfied by evidence from eye witnesses that shortly before the accident the insured, who was a good boatman, was seen on a river with a young woman in a "cranky" canoe, which was likely to overturn at any moment unless unusual care was exercised both by the insured and his companion, and that in less than five minutes from the time at which they last were seen alive the canoe was overturned and their bodies were under water.

The admission of immaterial evidence which could not have harmed the excepting party will not support an exception.

HAMMOND, J. This is an action upon a policy of insurance against accident. The case is before us upon the exceptions taken by the defendant at the trial, in which a verdict for the plaintiff was returned for the full amount claimed.

1. One of the grounds of defence was that there had been no compliance with the arbitration clause. The judge ruled that

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the clause was valid, but submitted to the jury the question whether there had been a waiver; and the jury found a waiver. The question upon this branch of the case is whether this action of the judge was prejudicial to the defendant. We have not found it necessary to consider whether there was any evidence of waiver because we are of opinion that the arbitration clause is invalid.

The clause is as follows: "10. In the event that this company and the certificate holder or beneficiary disagree as to the liability of this company under this certificate, it is agreed, and this certificate is issued upon the express condition, that such liability and the amount thereof shall be determined by arbitration; the board of arbitrators to consist of three members of the order of the Odd Fellows, one to be appointed by the company, one by the claimant, and the third shall be the Noble Grand of the lodge of which the assured is a member; and that no legal proceedings for recovery under this certificate shall be brought until the expiration of three months after receipt by the company of acceptable proofs of loss, and of a request in writing, in case of disagreement, to arbitrate, and a refusal by the company to arbitrate; and the company shall not be liable in any legal proceeding unless said proceeding is commenced within six months from the time when the right of action accrues and no suit shall be brought in any case except to enforce payment of the award of said arbitrators unless" the company refuses to arbitrate.

It is to be noted that the subject of reference is not merely the question of damages, or, as put by Colt, J. in *Wood* v. *Humphrey*, 114 Mass. 185, 186, such a matter as does "not go to the root of the action, but . . . [is] . . . only preliminary thereto or in aid thereof — such as respect[s] the mode of settling the amount of damage, or the time of paying it, or the like," but it includes also the question of the "liability of this company under this certificate." To what extent and under what circumstances an agreement to refer a question of liability to arbitration is valid has been the subject of considerable discussion in the courts of England and this country. In England, as stated by W. Allen, J. in *Reed* v. *Washington Ins. Co.* 138 Mass. 572, 576, "The question . . . has been one of the construction of contracts, —

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whether the agreement to refer in the particular contract under consideration is a condition precedent to a right of action upon the contract, or an agreement to refer a right arising under other provisions of the contract." See *Scott* v. *Avery*, 8 Exch. 487, 497; 5 H. L. Cas. 811; *Edwards* v. *Aberayron Ins. Society*, 1 Q. B. D. 563; *Spurrier* v. *La Cloche*, [1902] A. C. 446. Perhaps the statement of Maule, J. in *Avery* v. *Scott*, 8 Exch. 497, 499, quoted with approval by Lord Lindley in *Spurrier* v. *La Cloche*, *ubi supra*, contains the principle of the distinction in its most concise form: "There is no decision which prevents two persons from agreeing that a sum of money shall be payable upon a contingency; but they cannot legally agree, that, when it is payable, no action shall be maintained for it." To whatever extent this court would follow the English courts in the first class of cases described by W. Allen, J. as quoted above, namely, those in which the agreement to refer is a condition precedent to the right of action, or, in other words, where the agreement to refer is one of the essential elements of the cause of action, it is certain that in this State, and quite generally in many other jurisdictions, in the second class of cases described, namely, those in which the agreement is to refer a right of action arising under other provisions of the contract, the agreement whether contained in the same or a separate paper is void as an attempt to oust the courts of jurisdiction. *Wood* v. *Humphrey*, 114 Mass. 185, 186. *White* v. *Middlesex Railroad*, 135 Mass. 216. For an extensive collection of the cases see 9 Cyc. 512, note 77.

Upon an inspection of the policy in this case we are of opinion that the clause in question comes under the second class of cases above named, and that it is in substance an agreement to refer a cause of action arising under the other provisions of the contract, and therefore is void as an attempt to oust the courts of their jurisdiction. The first page of the policy contains an express promise to pay a certain sum to the estate of the insured in case of his death from one of the causes named. It also contains an express promise to pay certain sums, varying with the extent of the injury, to the insured. These promises are made subject to the by-laws of the company and the conditions thereto annexed. Neither in the by-laws nor in the conditions annexed is

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there any provision for arbitration. We have then an express promise to pay a certain definite sum of money upon compliance with certain expressed conditions. So far the minds of the parties have met. But the conditions are numerous and it was manifest that a disagreement might arise between the insurer and the beneficiary as to whether a particular condition had been complied with; and the liability of the insurer might turn on that question. There also might arise other disagreements as to the extent of the injuries, for instance whether the injury was such as to bring the case under one promise where a certain sum would be due, or under another promise where only a much smaller sum would be due. With the possibility of the various disputes before them the clause in question is framed by the parties. It comes at the end of a definite contract. It being placed immediately before the attesting clause provides that in the case of a disagreement between the company and the beneficiary "as to the liability of this company under this certificate," the question of "liability and the amount thereof" shall be referred, etc. It is plain that this clause is speaking of a liability on any of the promises thereinbefore set forth. It assumes the existence of a dispute as to whether the conditions under which the express promise to pay is made have been met so that the money is due, or in other words whether the money is due under that express promise. In this very case one of the questions raised — and indeed the principal question — is whether the condition with reference to the testimony of an eye witness as to the facts and circumstances of the accident has been complied with, or, in other words, whether the money is due under the terms of one of the promises. In view of the definite promises contained in the contract, of the express reference to the conditions to which they are subject, and of the situation of the clause in question and of the language of its opening sentence, we are of opinion that the clause cannot be regarded as qualifying the nature of any of the preceding promises, or as an essential element of liability thereon, but that it must stand as an agreement to refer questions of liability arising upon either of the promises. As thus construed the agreement to refer is invalid as an attempt to oust the court of its jurisdiction. The agreement to refer being invalid the whole of the clause is inoperative. See *Baden-*

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feld v. *Massachusetts Accident Association*, 154 Mass. 77. Since the clause is invalid the question of waiver is immaterial; and the defendant has suffered no injury from the action of the judge in submitting that question to the jury.

2. It also is contended by the defendant that the policy does not cover accident by drowning unless as a result of the accident there are upon the body external marks of contusion or wounds. In considering this ground of defence it is to be observed that the provisions of the policy are very voluminous, elaborate and intricate. Many of them are printed in very fine type. It is the general rule in the construction of an insurance contract, that any doubt arising upon its face as to its meaning is to be resolved in favor of the insured. This rule is founded in sound sense, and is particularly applicable to a contract so complicated in detail as the one before us. Bearing in mind this rule of construction we proceed to look into this policy. Upon the first page it is said that the insurance is "against personal bodily injury leaving upon the body external marks of contusion or wounds." Upon the second page, under the head of "What is insured against," it is said that "This certificate of insurance provides against bodily injuries, such as dislocations, fractures, broken bones, bruises, cuts, accidental gun-shot wounds, crushing or mangling, burns and scalds, bites of dogs, stroke of lightning, drowning, or injuries produced by falls, effected through external, violent and accidental means, within the intent and meaning of this contract and its conditions as hereto annexed." Then follows a statement of the conditions. The conditions are very complicated and numerous, and are printed in very fine type. It is unnecessary to insert them here. It is sufficient to say that they provide in substance that "in the event of any accidental bodily injury, fatal or non-fatal, contributed to or caused by" any one of a long list of events accidental or otherwise which are detailed at great length, the limit of liability in case of death shall be only "one-twentieth of the . . . death benefit provided for in this policy." The part as to drowning is in these words: "drowning or shooting when the facts and circumstances of the accident and injury are not established by the testimony of an actual eye witness; and also when in an alleged drowning (shipwrecks at sea excepted) the body

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is not recovered and identified." Then follows a semicolon, followed by these words: "and in case of injuries whether fatal or disabling of which there is no visible mark on the exterior of the body visible to the eye (the body itself in case of death not to be deemed such mark)."

In cases of drowning death is caused by the filling of the lungs with water so that the air cannot get to them, and there is no reason why there should be any external mark of contusion or wound. In the ordinary case, therefore, none is to be expected. And if while drowning the body is bruised, there is usually no natural or necessary connection between such bruise and death. Suppose two persons, each having a policy like this, are accidentally swept overboard from a ship by the same wave. One goes clear and receives no mark, while the other is bruised and scratched by a spike in no way disabling him as he goes over the rail. Both are drowned and both bodies are recovered. Upon the body of the first is found no external mark or contusion or wound, while upon the body of the other appears the work of the spike. Is it to be said that the first case is covered by the policy and the second is not? To hold that drowning is not covered by the policy unless in addition to the flooding of the respiratory organs there is some external mark of contusion or wound is to base a distinction upon a circumstance which generally has nothing whatever to do with the cause of the death, and moreover is to eliminate practically the ordinary and usual case of drowning. An interpretation founded upon such a basis of distinction, and leading to results so unreasonable is not to be adopted unless clearly required by unmistakable language.

In view of these and other obvious considerations the provisions of the policy relating to external marks of contusion and wounds must be held applicable to the more violent causes of injury and not to the case of death by drowning.

3. The policy provides that in case of loss the company shall pay to the estate of the insured "in trust however for and to be paid over forthwith to his legal heirs"; and the defendant contends that the policy could not be made payable to the estate, because, if so made, the sum received would be assets for the payment of debts and expenses of administration and would be subject to an unrestricted disposition by will, which would

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be inconsistent with the statutes. But this is not a case where the estate is the beneficiary, as was *Daniels* v. *Pratt*, 143 Mass. 216, upon which and other similar cases the defendant relies. By the express provision of the policy the administrator receives the money solely in trust for the heirs at law and is answerable for it to no one else. In substance, then, the real beneficiaries are the heirs at law. The money when recovered goes to them and there is no violation of the statutes. See *Rindge* v. *New England Aid Society*, 146 Mass. 286; *Shea* v. *Massachusetts Benefit Association*, 160 Mass. 289; *Sargent* v. *Sargent*, 168 Mass. 420, and cases cited.

4. The difficult question in the case is one of damages. Shall the plaintiff recover the full sum of $5,000, or only one twentieth of that sum, to wit, $250? The answer turns upon the meaning of the clause in the policy respecting eye witnesses. This clause is found among the large amount of fine print upon the second page of the policy under the head of "Conditions," and, so far as material to the question before us, is as follows: "In the event of any accidental bodily injury, fatal or non-fatal, contributed to or caused by . . . drowning or shooting when the facts and circumstances of the accident and injury are not established by the testimony of an actual eye witness, . . . then and in every such case the limit of the liability of this company hereunder shall be one-twentieth of the accidental death benefit provided for in this policy not to exceed two hundred and fifty dollars for accidental death, and for non-fatal injuries causing total or partial disability, one-fifth of the weekly indemnity provided for in this policy." This whole paragraph of which the above is a part describes more than two dozen cases in either one of which the same reduction to one twentieth is to be made. Although the case before us is one of drowning, still upon the question of interpretation the fact that the clause includes also injury or death by shooting may be properly considered.

The clause seems to be of somewhat recent origin in policies of insurance, and our attention has not been called by counsel to any case, nor are we aware of any except *National Accident Society* v. *Ralstin*, 101 Ill. App. 192, in which it has received judicial attention. That case was one of shooting and the injury was not fatal. It was held that the plaintiff, who was the

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injured person, was an eye witness to his own injury. It was further said that an eye witness to a shooting does not necessarily mean one who saw the load leave the gun.

Before the insertion of this clause the insurance companies labored under some difficulty in their defence. Especially was this felt in cases of death by drowning or shooting. If the defence was that the death was suicidal, inasmuch as suicide was not to be presumed, the burden of showing suicide was upon the defendant; and where the facts and circumstances of the accident were shown only by circumstantial evidence there frequently would be great difficulty in sustaining this burden even if death actually was suicidal. Moreover, in the case of disappearance of the person whose life was insured, and the subsequent finding of the dead body in the water, the question whether death was caused by drowning or by some disease or cause not insured against was frequently embarrassing to the defence. A good illustration of such a case is *Trew* v. *Railway Passengers' Assurance Co.* 6 H. & N. 838. In that case it appeared that the assured left his lodgings for the purpose of bathing, and was not afterwards seen alive. Subsequently his clothes were found by the water side. A body was found in the water at a distance from the place where he went to bathe, but not at such a distance that it might not have been carried there by the waves, and there was some evidence that this was the body of the assured. It was held that, assuming that the body was that of the assured, it was a question for the jury whether the death was by drowning or by suicide or natural causes, such as apoplexy or heart disease or the like. In an attempt to meet such cases doubtless, a clause has been inserted in policies providing in substance that there shall be no recovery in certain cases unless the claimant proves by direct and positive proof that the death or injury was caused by accident and was not the result of design, or in other words was from a cause covered by the policy. But it was held that such a clause did not make it necessary that the facts and circumstances of the injury should be shown by persons who were actually present when the insured received the injuries, but that it was sufficient if they were shown by circumstantial evidence. *Travellers' Ins. Co.* v. *McConkey*, 127 U. S. 661. *Utter* v. *Travelers' Ins. Co.* 65 Mich. 545.

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It would seem as if the clause under consideration was inserted in view of these and other similar decisions. It is not to be disposed of by the remark that it is in fine print, or is in the nature of a trap or catch and hence is to be wholly disregarded. It forms a part of the contract and must be fairly construed. What does the clause mean? An eye witness is a person who testifies to what he has seen. By the terms of this policy the facts and circumstances of the accident and injury are to be established by those who saw them. Not only are the facts and circumstances of the injury to be established by an eye witness, but also those of the accident, that is, the operating cause of the injury. Enough must be testified to by eye witnesses to show the operating cause of the injury, or at least to show that at the time of the injury there was an operating cause to which the accident may fairly be attributed, and to indicate in a general way the nature of that cause and the manner of its working. To illustrate: Suppose a person standing upon the shore sees not far out a boat sailing peacefully along in a mild breeze, with a competent and careful man at the helm. The boat is so large and steady that it is not likely to be capsized by any movement the man would make, nor by the wind as then blowing. In no sense can the boat be said to be in then present peril from any cause. Suppose the observer leaves the shore and returns in an hour, and then sees the upturned boat near where he first saw it. During his absence an accident has happened resulting in the upsetting of the boat. Can it be said that he has seen the circumstances of the accident within any fair interpretation of the language? He has seen no cause in operation to which the accident may be fairly attributed. But suppose that when he first sees the boat, or while he is looking at it, a squall suddenly looms up in the distance and rapidly approaches the boat. He sees it strike the boat, putting her in evident peril. Wanting to get a better look he runs to a house for a spy glass, is gone only a few minutes, and when he returns sees only a capsized boat. Such a man is an eye witness of the accident, although he did not actually see the boat capsize. He saw the boat in peril from a then impending cause. He saw the cause at work and he saw what was the natural effect of such a cause. That is far

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enough; and in such a case the cause of the accident must be held to have been established by an eye witness within the meaning of the policy.

In the light of this interpretation of the clause we proceed to examine the evidence in this case to see to what extent the facts and circumstances of the accident and the injury are shown. One Black testified that about five minutes before four o'clock in the afternoon of June 25, 1902, he, being out on the river in a skiff with one Reissman, saw Lewis in a red canoe with a lady, going "in the opposite direction from the way the witness was going. Lewis was paddling the canoe sitting in the stern, and Miss Hurley was sitting in the centre of the canoe on the bottom, leaning back against the cushions. The pair were talking, and Lewis smiled and bowed to witness." The witness had known Lewis very well for two years. "Lewis looked bright and happy; . . . the pair were chatting together; . . . Miss Hurley appeared the same as any young woman on the river; and . . . there was nothing unusual in the appearance of either; . . . they were going quite swift and . . . Lewis was a good hand on the river." He "had his coat and vest off." Reissman, who was with Black, testified substantially to the same facts. He further said that about three or four minutes after they had passed the couple, and after a point of land had shut the canoe out of sight, he heard a scream, but could not swear whether it was the scream of a man or a woman; that it did not seem to him at the time to be a cry of agony; that it seemed like a cry of despair, but that he did not go back, and never thought any more of it until the next day when he heard of the accident. So far as appears this was the last time that either Lewis or Miss Hurley was seen alive.

One Chellman testified that he was out on the river that afternoon, but did not know Lewis; that shortly before four o'clock the witness and a man named Esselen "were coming up the river and found the overturned canoe; that they were paddling and had been picking pond lilies; that as they came around the bend he discovered the cushions and the lady's coat, gentleman's coat and lady's hat, and a red canoe, bottom up; that the carpet was with the canoe with one end thrown over the bottom, and after paddling around they found a gentleman's vest five feet

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under water; that he fished it out, that it was not on the bottom; that he looked at the watch and that it was stopped at four o'clock; that the vest was soaked through, but that the other things had not sunk below the surface; that these things were found not later than quarter past four; that they picked up the things," and towed the boat to the Hiatt boat house. On cross-examination he appeared a little uncertain as to the precise time, but placed the time as near four o'clock. He also said that the canoe was about twenty feet from the shore. He was corroborated by Esselen, who fixed the time of picking up the things as "within ten or fifteen minutes past four."

The next day the bodies of Lewis and Miss Hurley were taken from the river near the place of the accident, and there was no question about identification. There were no external marks upon the body of Lewis, and the medical examiner testified that death was caused by drowning, and that in his opinion it was a case of accidental drowning. Hiatt, the owner of the canoe, testified that Lewis hired the canoe about two o'clock; that he "seemed natural"; and that "he was a very good boatman and had been coming constantly to his boathouse for two seasons." As to the canoe he testified that it was a "sixteen foot canoe of thirty-four or thirty-five inch beam, made of cedar with a canvas skin and painted red"; that it "was what he should call a medium safe canoe, that a person would have to be more careful with it than with a larger one." On cross-examination he testified that there "was no reason for his [Lewis's] upsetting in a medium safe canoe; . . . that he was a perfectly competent man and had a perfectly safe canoe."

It is unnecessary to recite the evidence further in detail. The jury might have found on the evidence of actual eye witnesses that shortly before the time when the accident happened Lewis and Miss Hurley were upon the river in what might be called a "cranky" canoe, liable to overturn at any moment unless unusual care was exercised both by Lewis and his companion; that within five (perhaps fewer) minutes of the time at which they were last seen alive the canoe was overturned and the bodies were under water. Here then is shown upon the testimony of eye witnesses an operating cause, — namely, the imminent liability of the capsizing of the boat by reason of its

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cranky nature, taken in connection with the fact that it had two occupants of whom one was a young woman not shown to have been experienced in aiding to keep the canoe in balance. It is not the case of a boat which is of such size and construction as to be not liable to be upset by the movements of persons in it, but it is the case of a cranky canoe having two persons in it where a not unusual movement, even of one of them, may result in the capsizing of it. An operating cause for disaster is ever present under such circumstances, and that cause is disclosed by the testimony of eye witnesses. Moreover, upon the evidence the jury might have found that the movements of the canoe and its occupants were shown by eye witnesses up to a time within three or four minutes of the accident, and that every operating cause of the accident except the one above shown to have been present was fairly excluded by the testimony of these same eye witnesses. It must be held that in the case before us the facts and circumstances of the accident and injury were established by eye witnesses within the meaning of the policy. We see no substantial error in the manner in which the trial judge dealt with this branch of the case.

In view of our decision upon this point it becomes unnecessary to consider the contention of the plaintiff that such a provision is void upon the ground that it is an attempt to dictate to a court as to rules of evidence.

5. Under the circumstances disclosed in this case we do not see how it was material whether the defendant is a fraternal beneficiary association or not. The action is upon the policy. The exceptions to the admission of the evidence are also overruled. Even if the evidence excepted to was immaterial, as contended by the defendant, we do not see how the defendant could have been harmed by its admission.

Exceptions overruled.

The case was argued at the bar in December, 1905, before *Knowlton*, C. J., *Morton*, *Hammond*, *Loring & Sheldon*, JJ., and afterwards was submitted on briefs to all the justices.

H. W. Ogden, (*J. B. Crawford* with him,) for the defendant.

W. M. Noble, (*H. R. Morse* with him,) for the plaintiff.

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COMMONWEALTH *vs.* AUGUST BECK.
SAME *vs.* JOHN F. MURPHY.
SAME *vs.* EDMUND MURPHY.
SAME *vs.* JOHN MEEHAN.
SAME *vs.* EUGENE MURPHY.
SAME *vs.* FRANCIS J. BOYLE.

Worcester. October 3, 1906. — January 4, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Municipal Corporations, By-laws and ordinances. *License. Express Company.*

Under R. L. c. 25, § 24, a city has power to pass an ordinance requiring a license from the board of aldermen for every wagon or other vehicle used for the conveyance of goods for hire from place to place within the city, which applies to wagons used in the express business to transport from the railroad station to the persons in the city to whom they are addressed goods sent by express from other cities.

SIX COMPLAINTS for violation of the so called hackney carriage ordinance of the city of Fitchburg which is quoted in the opinion.

In the Superior Court the cases were submitted to *Wait*, J. upon an agreed statement of facts. The defendants requested the judge to rule that upon the agreed facts, the substance of which is stated in the opinion, they could not be convicted. The judge refused to make this ruling, and thereupon the defendants severally pleaded guilty to the complaints against them, and alleged exceptions to the refusal of the judge to rule as requested.

The case was submitted on briefs.

D. I. Walsh & T. L. Walsh, for the defendants.

G. S. Taft, District Attorney, *& E. I. Morgan*, Assistant District Attorney, for the Commonwealth.

HAMMOND, J. Each of these six cases is a complaint for a violation of the following ordinance of the city of Fitchburg: "Sect. 3. No person shall set up, use or drive, any hackney carriage, wagon, dray or other vehicle, whether on wheels or runners, for the conveyance from place to place within the city,

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for hire, of any goods, wares, merchandise, furniture, or any other article of transportation, without a license for such wagon, dray or vehicle, from the board of aldermen, or some person by them designated to issue licenses."

The defendants are all residents of Fitchburg, three of them being respectively proprietors of different express companies so called, and the other three being employed respectively as drivers by the proprietors. The express companies all had offices in Fitchburg, and two of them also had an office in Boston, while the third also had an office in Worcester. The business of the companies was transacted as follows: Orders were taken at the various offices or elsewhere for the purchase of merchandise in other places than Fitchburg, both within and without the Commonwealth. At the time of receiving the order they usually received a cash payment to cover the cost of the goods to be bought, and upon delivery of the goods by these companies to the persons for whom the order was taken they received a cash payment to cover express charges or the cost of transportation. The merchandise so ordered was sent from the shipping point, usually Boston, by freight over the Boston and Maine Railroad to Fitchburg. All consignments to each company on each day (which consisted of various single packages addressed to various persons in Fitchburg, and directed in care of one or the other of the express companies) were invoiced and billed by the Boston and Maine Railroad to the express company in whose care it was directed. The express companies paid the freight transportation and their agents receipted for the goods at the Fitchburg freight depot. The packages were then delivered to the various persons to whom they were addressed in Fitchburg by the teams of the express companies, and those teams were driven at various times over public ways in the city of Fitchburg by each of the six defendants, and no licenses had been issued to any of the six defendants, or for any of the conveyances used in their business. The freight charges, which were paid by the companies at the hundred weight rate, varied from less than five cents to twenty cents for a single package, while the companies collected from the purchasers of the goods for transportation by the railroad and delivery by wagon from fifteen cents to fifty cents for each package.

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The defendants contend that they engaged in an express business which is not local but "interurban," and that "the power to establish an ordinance to compel persons engaging in the express business to obtain a license for their vehicles, applies only to those whose business is purely local."

The authority to pass ordinances for the regulation of carriages is found in R. L. c. 25, § 24, which provides that "a city or town may make ordinances or by-laws, or the mayor and aldermen or the selectmen may make rules and orders, for the regulation of carriages and vehicles used therein, however propelled, with penalties for the violation thereof not exceeding twenty dollars for one offence; and may annually receive one dollar for each license granted to a person to set up and use any carriage or vehicle therein. Such rules shall not take effect until they have been published at least one week in a newspaper published in the city, town or county."

The defendants are certainly within the general language of the ordinance. They are setting up, using and driving wagons "for the conveyance from place to place within the city, for hire, of . . . goods . . . [and] . . . merchandise." There can be no doubt of that. The only place from which the goods are taken to be placed in the wagons is the railroad station in the city, and the various places where they are taken from the wagons are also in the city, and are nowhere else. In a word, these carriages, so far as they are used at all in this business, are used exclusively in the city. The statute upon its face seems broad enough to cover a vehicle so used, but the defendants insist that there is an implied exception as above stated to an express business between two or more cities or towns, and in support of their contention they rely upon *Commonwealth* v. *Stodder*, 2 Cush. 562. In so far as the language of Dewey, J., in that case refers to such a distinction it is a mere dictum, for the case, which arose under St. 1847, c. 224, went off on an entirely different ground. After the decision in that case, St. 1850, c. 275, amending St. 1847, c. 224, was passed, and both statutes were consolidated and re-enacted in Gen. Sts. c. 19, § 14, Pub. Sts. c. 28, § 25, and R. L. c. 25, § 24. Upon an examination of these statutes we are of opinion that notwithstanding the dictum in *Commonwealth* v. *Stodder*, the fact that these

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teams are used to complete the carriage of goods in the manner described is not sufficient to exempt them from the statute. The ordinance is within the authority covered by the statute and is valid.

Exceptions overruled.

COMMONWEALTH *vs.* LOUIS BRENNOR.

Essex. November 7, 1906. — January 4, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Practice, Criminal, Exceptions. *Accomplice.*

At the trial of an indictment for receiving stolen goods knowing them to have been stolen, in which the persons who stole the goods had testified as witnesses, the defendant asked the judge to state to the jury that it was not safe to convict upon the uncorroborated testimony of accomplices and to advise the jury to acquit unless their testimony was corroborated upon some material point. The judge refused this request, but instructed the jury that they should consider the testimony of the accomplices with the utmost care and scrutiny unless they found it to be corroborated by other testimony on some point material to the case and further stated that they well might hesitate to convict unless there was such corroboration. *Held,* that the defendant had no ground for exception.

At the trial of an indictment for receiving stolen goods knowing them to have been stolen, in which the persons who stole the goods had testified as witnesses and there was ample corroborative evidence of the theft, the defendant excepted to the refusal of the presiding judge to rule that there was no testimony which corroborated that of the accomplices upon any material point. *Held,* that one of the material points was that the goods had been stolen and therefore that the request was refused rightly, it not being open to the defendant to argue that what he meant by "some material point" was something connecting the defendant with the crime with which he was charged.

At the trial of an indictment for receiving stolen goods knowing them to have been stolen, with two counts relating respectively to two lots of goods stolen from the same place on successive days, each lot having been stolen by three persons, of whom only two were the same, all of the persons who stole the goods testified as witnesses, and the person who joined in stealing the goods described in the first count but who had nothing to do with stealing the goods described in the second count, testified to transactions of the defendant relating to the goods described in the first count which were evidence of the defendant's guilty knowledge and intent in receiving the goods described in the second count and also tended to show a plan of action between the defendant and the two other persons who joined in stealing both lots of goods for the disposal of the goods stolen by them. The defendant excepted to the refusal of the presiding judge to rule that there was no testimony which corroborated that of the

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accomplices on any material point. *Held*, that, assuming that the judge and counsel both understood that corroboration upon some material point meant evidence tending to connect the defendant with the crime with which he was charged, and that such corroboration must be other than the testimony of another accomplice, yet the request, which was applicable to the whole case, was refused properly, as the testimony of the witness not concerned with the theft described in the second count was such corroboration in regard to the offence described in that count.

INDICTMENT, found and returned in the Superior Court for the county of Essex on January 13, 1906, in two counts, charging the defendant with buying, receiving and aiding in the concealment of certain property of the W. C. Lewis Shoe Company, knowing it to have been stolen, the property which the defendant was charged in the first count with receiving consisting of thirty-six cases of soles of the value of $5.40 stolen on June 23, 1905, and the property which the defendant was charged in the second count with receiving consisting of sixty other cases of soles of the value of $6, stolen on June 24, 1905.

At the trial in the Superior Court before *Harris*, J. the jury returned a verdict of guilty; and the defendant alleged exceptions, raising the questions which are stated in the opinion.

J. P. Sweeney, for the defendant.

H. C. Attwill, Assistant District Attorney, for the Commonwealth.

HAMMOND, J. The defendant requested the judge to state to the jury that it was not safe to convict upon the uncorroborated testimony of accomplices, and to advise the jury to acquit unless their testimony was corroborated on some material point. This the judge declined to do, but instructed the jury that they should consider the testimony of the accomplices with the utmost care and scrutiny unless they found it to be corroborated by other testimony on some point material to the case, and further stated that they might well hesitate to convict unless there was such corroboration.

The defendant then requested a ruling that as matter of law there was no testimony which corroborated that of the accomplices upon any material point. This ruling also the judge refused.

The defendant was charged with receiving stolen goods, knowing them to have been stolen. One of the material points to be

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proved was that the goods had been stolen. There was ample corroborative evidence of the theft, and therefore the request literally interpreted should not have been given.

But it is now argued by the defendant that what he meant by "some material point" was something connecting the defendant with the crime with which he was charged. See *Commonwealth* v. *Holmes*, 127 Mass. 424, and cases cited. The difficulty however with this contention is that the requests are not so worded, nor do they necessarily imply that.

But even if it be assumed in favor of the defendant that both judge and counsel understood that corroboration upon some material point meant evidence tending to connect the defendant with the crime with which he was charged, (*Commonwealth* v. *Holmes*, 127 Mass. 424,) and further that the corroboration must be by evidence other than that of another accomplice, and still further that under the circumstances the defendant had the right to an instruction as to whether there was corroborative evidence, we are of opinion that the refusal to give the ruling that there was no corroborative evidence was correct.

There were two counts, one for goods stolen and received on the twenty-third day of June, and the other for goods stolen and received on the next day. There was evidence in support of both counts. Collins, Terrence J. Sweeney and Terrence E. Sweeney stole the goods to which the first count related, and Collins, Terrence J. Sweeney and Lahey stole those to which the second count related. Lahey is not shown to have been concerned in the first theft, nor Terrence E. Sweeney in the second. Now one of the material points was to show the defendant's guilty knowledge of the theft, and it was a point tending to connect him with the crime. The testimony of Terrence E. Sweeney, who had nothing to do with the second theft, as to the transactions of the defendant relating to the first count, would have been independent evidence to show the defendant's guilty knowledge and intent in the transactions of the second count, and as also tending to show a scheme or plan of action between the defendant and Collins and Terrence J. Sweeney for the disposal of goods stolen by them. *Commonwealth* v. *McCarthy*, 119 Mass. 354. *Commonwealth* v. *Cotton*, 138 Mass. 500. *Commonwealth* v. *Russell*, 156 Mass. 196. *Commonwealth* v. *Corkery*, 175 Mass. 460.

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The request being applicable to the whole case was properly refused. It becomes unnecessary to consider whether there was other corroborative evidence.

Exceptions overruled.

HORACE N. NOYES *vs.* ETHEL L. NOYES.

Essex. November 8, 1906. — January 4, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Marriage and Divorce, Connivance.

If a husband, for the purpose of affording his wife an opportunity to commit adultery with a certain person and desiring that she shall do so in order that he may obtain a divorce, arranges with the owner of a house that it may be used by his wife on a certain evening without interference or interruption, and the wife knowing nothing of the arrangement commits the anticipated adultery there on that evening, these facts constitute connivance on the part of the husband, and he cannot maintain a libel for divorce by reason of the adultery.

LIBEL, filed November 16, 1904, for divorce on the ground of adultery alleged to have been committed with one Dodge.

The answer contained a general denial, and alleged condonation and connivance.

In the Superior Court the case was heard by *Gaskill*, J. The judge, without hearing the libellee or any of her witnesses, found that adultery, if committed before November 5, had been condoned, and that the libellant arranged "as stated in his testimony as hereinbefore recited" with one Dow that an opportunity should be afforded the libellee by permitting her and the co-respondent to pass the evening of November 5 alone in Dow's house without interference and without interruption by other persons, although such permission theretofore, on the morning of November 4, had been refused the libellee by Mrs. Dow, and ruled as matter of law that the facts so found were connivance on the part of the libellant. There was no evidence that the libellee had any knowledge of the arrangements between the libellant and the detectives and the libellant and either Mr. or Mrs. Dow.

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By agreement of the parties the following statement was allowed by the judge to be added to the bill of exceptions:

"The libellant introduced testimony tending to show that on said evening of November 5th, the libellee and the co-respondent went to Dow's house shortly after dark unlocked the door entered the house down stairs and remained there until nine o'clock that evening; that shortly before they entered the house three men in the employ of the libellant also went to this house, found the door locked and no one there, unlocked the door, went inside and upstairs and remained there until shortly after nine o'clock when they came down stairs and found the libellee and the co-respondent in a situation which, if their testimony is to be believed, would warrant a finding that adultery had been committed.

"There was evidence that no person other than the libellee, the co-respondent and these men was in the house during the evening."

The judge ordered that the libel be dismissed. To this order and to the ruling stated above the libellant alleged exceptions.

E. B. Fuller, for the libellant.

H. F. Hurlburt, Jr., for the libellee.

HAMMOND, J. The trial judge found that the libellant arranged, as stated in his testimony which is recited in the bill of exceptions, with one Dow that an opportunity should be afforded the libellee by permitting her and the co-respondent to pass the evening of November 5 alone in Dow's house, without interference and interruption by other persons, although such permission had theretofore on the morning of the preceding day been refused the libellee by Mrs. Dow, and having so found, "ruled as matter of law that the facts so found were connivance on the part of the libellant." He thereupon ordered that the libel be dismissed, "and to the rulings aforesaid and said order the libellant duly excepted." In an amendment to the bill it is stated that the finding was made only upon the evidence recited in the bill.

It is contended by the libellant that the only question arising on the record is whether the testimony of the libellant, which is the only testimony reported, shows as matter of law connivance; but we do not so interpret the record. The only ruling made

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was that certain facts found by the trial court constituted in law connivance, and the question whether the evidence warranted the finding does not seem to have been raised. The evidence upon which the finding was made was circumstantial to a certain extent; and according to the relative degree of credit to be given to the libellant's denials of inferences which might be drawn against him from the facts stated by him, the finding might be either way. The judge evidently placed more reliance upon the legitimate inferences from the facts stated by the witness than he did upon the denial of the inferences. The witness was before him, and as he went on the judge had an opportunity by observing him to test his sincerity in his denials.

Even if the question whether the finding is sustained by the evidence is before us, we are of opinion that it is so sustained. The evidence warranted the finding that the libellant desired that on the night in question his wife should commit adultery, or at least that she should be placed in such a compromising position as to lead to the inference of the committal of that act; that he desired to do this so that he might get a divorce and be freed from her and his real estate be free from any claim on her part; that Mrs. Dow, who was to be away, had refused the libellee the use of the house for that evening; that the libellant knew it and feared that Dow might be at home; and that the libellant's purpose in seeing Dow was to induce him to stay away, not only that a crime, if committed, might be detected, but that it might be committed; and that in that way, by active exertion, he aided in procuring the house for an adulterous use by his wife, when otherwise she would not have had it. In other words, the evidence warranted the finding made by the judge that the libellant arranged with Dow that the house should be used by his wife without interference or interruption on the part of other persons, although such permission had been refused by Mrs. Dow. Under the circumstances of the case this must be held to be a finding that the libellant did this to facilitate the committal of adultery by his wife.

Was such an act as matter of law connivance on the part of the libellant? The law upon this subject was quite fully considered by this court in *Wilson* v. *Wilson*, 154 Mass. 194.

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Morton, J. speaking for the court, uses the following language: "Merely suffering in a single case a wife whom he already suspects of having been guilty of adultery to avail herself to the full extent of an opportunity to indulge her adulterous disposition, which she has arranged without his knowledge, does not constitute connivance on the part of the husband, even though he hopes he may obtain proof which will entitle him to a divorce, and purposely refrains from warning her for that reason. He may properly watch his wife whom he suspects of adultery, in order to obtain proof of that fact. He may do it with the hope and purpose of getting a divorce if he obtains sufficient evidence. He must not, however, make opportunities for her, though he may leave her free to follow opportunities which she has herself made. He is not obliged to throw obstacles in her way, but he must not smooth her path to the adulterous bed. 2 Bish. Marriage & Divorce, (5th ed.) § 9. *Timmings* v. *Timmings*, 3 Hagg. Eccl. 76. *Stone* v. *Stone*, 1 Rob. Eccl. 99, 101. *Phillips* v. *Phillips*, 10 Jur. 829."

Applying the law to the findings of the court as interpreted by the issues on trial, it is clear that the ruling that as matter of law the facts show connivance was correct. By his arrangement with Dow the libellant assisted his wife on "her path to the adulterous bed." It is immaterial that she was unaware of this assistance. As additional cases bearing upon the law of connivance, see *Morrison* v. *Morrison*, 136 Mass. 310; *Robbins* v. *Robbins*, 140 Mass. 528.

Exceptions overruled.

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FRANCIS M. RYDER *vs.* OVIDE OUELLETTE.

Bristol. November 14, 1906. — January 4, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Poor Debtor. Recognizance.

Under R. L. c. 168, § 65, a surety on the recognizance of a poor debtor in order to surrender his principal and exonerate himself from further liability must secure the attendance of an officer qualified to serve legal process in the case to whom the principal may be committed, as is required by R. L. c. 169, § 19, in case of a surrender by bail.

It is not a performance by a poor debtor of the condition of his recognizance that within thirty days from the date of his arrest he delivered himself up for examination before a court of record, unless he gave notice thereof to the judgment creditor, and the refusal of the court to issue the notice does not excuse its absence.

A court to which a poor debtor has delivered himself up for examination without giving any notice to the judgment creditor has no power to discharge the debtor.

CONTRACT against the surety on the recognizance of one Max L. Lizotte, a poor debtor. Writ in the Second District Court of Bristol dated May 3, 1905.

On appeal to the Superior Court the case was submitted to *Holmes*, J. upon an agreed statement of facts in substance as follows:

This was an action on a poor debtor's recognizance entered into in the Second District Court of Bristol on the thirty-first day of March, 1905, by Max L. Lizotte as principal and the defendant as surety. The declaration was in the form prescribed by statute, and the answer admitted the giving of the recognizance but denied every other material allegation in the declaration, and further alleged that the defendant on the eighteenth day of April, 1905, surrendered his principal in open court.

All the proceedings in the district court before April 18, 1905, were in regular form, and a copy of the record of the proceedings in that court on that day and subsequent thereto and a memorandum of the recognizance declared on were annexed.

The record showed that on March 31, 1905, Max L. Lizotte

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and Ovide Ouellette, the defendant, both of Fall River, appeared before that court, and severally acknowledged themselves to be indebted to the plaintiff, Lizotte as principal in the sum of $300, and the defendant as surety in the same sum, a copy of the recognizance being set forth.

The record further showed the following proceedings:

On April 18, 1905, the debtor being surrendered by Ovide Ouellette surety, and the debtor offering J. C. Emery Panneton as surety in place of Ouellette, the debtor gave recognizance with Panneton as surety, conditioned to deliver himself up for examination within thirty days of March 31, 1905.

On June 9, 1905, the judgment creditor suggested a diminution of the record relating to the surrender of the debtor, "in that it does not show whether an officer qualified to serve legal process was present in court when such surrender was made or attempted, and whether the principal therein was committed to any such officer in attendance," and prayed the court to amend the record in these particulars, so that these facts should appear.

The judge of the district court thereupon amended the record to read as follows:

"April 18, 1905. Then appeared before the court the debtor Lizotte, Ovide Ouellette his surety in his recognizance of March 31, 1905, and J. C. Emery Panneton. Said Ouellette stated that he wished to surrender said Lizotte and said Lizotte stated that he wished to submit to be surrendered and to be surrendered and to recognize anew with said J. C. Emery Panneton as surety; said Panneton stated that he wished to become surety in place of said Ouellette on said Lizotte's new recognizance. Whereupon having examined said Panneton and found him sufficient as a surety the court said that it would allow said Lizotte to recognize anew with said Panneton as surety. The court then purported to discharge said Ovide Ouellette as surety upon his recognizance of March 31, 1905, and to allow said Lizotte to recognize anew with said Panneton as surety; a memorandum of the second recognizance with Panneton as surety is among the papers in this case and is made a part of this record.

"There was no officer qualified to serve legal process in the

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case present. Said Lizotte, Ouellette and Panneton were all present during the whole of the proceedings.

"This second record under date of April 18, 1905, is an extension and amendment of the first record of date of April 18, 1905."

On April 29, 1905, the debtor filed a motion that twelve o'clock noon on that day at the district court be set as the time and place of his examination for the purpose of taking the oath for the relief of poor debtors, and that a notice be caused to be issued to the judgment creditor or his attorney, ordering him to appear at that time and place for the purpose of examining the debtor.

This motion was overruled by the judge of the district court who made the following entry thereon:

"April 29, 1905, 12.01 P. M. Then the debtor being present and neither the creditor nor his counsel being present, it was ordered on motion of the debtor that this action be dismissed."

At the same time the debtor also filed a motion, which was granted by the judge on the same day, that the debtor be discharged and the case be dismissed, and the surety be also discharged.

In the Superior Court the judge found for the plaintiff, and ordered that judgment be entered for the plaintiff in the sum of $300, the damages to be assessed.

It was agreed by the parties that $221.03 was the proper amount for which execution should issue on the judgment. The judge ordered that judgment should be entered accordingly; and the defendant appealed.

The case was submitted on briefs.

A. G. Weeks, for the defendant.

F. A. Pease, for the plaintiff.

HAMMOND, J. This is an action against the surety on a poor debtor's recognizance. There are two grounds of defence, first, that there was a surrender of the principal by the defendant, and second, that there has been no breach of the recognizance.

1. As to the surrender. It is provided in R. L. c. 168, § 65, that a surety on a poor debtor's recognizance may at any time surrender his principal and exonerate himself from further lia-

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bility in the manner provided for the surrender of bail, "and all the proceedings on such surrender shall be the same as provided in the case of bail." The proceedings on the surrender by bail in the inferior courts, so far as material to this case, are set forth in R. L. c. 169, § 19. This section provides that when bail surrender their principal in court, either during the pendency of the original action or of *scire facias*, they shall secure the attendance of an officer qualified to serve legal process in the case, to whom the principal may be committed. The reason for this is obvious. It is an important provision for the benefit and security of the creditor. The agreed facts show that no such officer was present at the time of the attempted surrender in this case, and it is not shown that the creditor has waived his rights. See *Pacific Ins. Co.* v. *Canterbury*, 104 Mass. 483. It follows that the attempted surrender was inoperative, and that the liability of the defendant as surety still continued.

2. As to the breach. Even if it be said that the principal debtor did "within thirty days from the date of his arrest deliver himself up for examination before some court of record," it is certain that he never gave any notice thereof to the judgment creditor. It is no excuse that the court refused to issue the notice. For aught that appears the court refused to issue the notice for the reason that it could not be served in time. But, however that may be, the debtor takes upon himself the risk of proper notice being given to the creditor. See *Thacher* v. *Williams*, 14 Gray, 824; *Hooper* v. *Cox*, 117 Mass. 1, and cases cited; *Adams* v. *Pierce*, 177 Mass. 206. No notice having been given, the discharge of the debtor was beyond the power of the court. See *Bliss* v. *Kershaw*, 180 Mass. 99, 103.

Judgment affirmed.

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MARY MURPHY *vs.* CHARLES F. WITHINGTON.

Suffolk. November 16, 1906. — January 4, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence.

If a man driving in a buggy in a city street sees ahead of him the structure of an elevated railway under which he will have to pass and, knowing that his horse is likely to be excited by the passage of trains upon the elevated structure and when so excited is likely to quicken his pace, proceeds to drive under the structure in an ordinary way with a loose rein when a train suddenly appears overhead and, the horse becoming nervous and making a bolt forward, he draws back the reins until his hands are at his shoulders but owing to the looseness of the reins is unable to get proper control of the horse, and the horse knocks down and injures a woman crossing the street, this is evidence of his negligence in an action brought against him by the woman for her injuries.

TORT for personal injuries incurred in the manner described in the opinion. Writ dated December 3, 1901.

In the Superior Court *Schofield*, J. refused a request of the defendant to rule that the plaintiff was not entitled to recover, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of $5,500, of which on requirement of the judge the plaintiff remitted all in excess of $4,500. The defendant alleged exceptions.

Asa P. French, (*J. S. Allen, Jr.* with him,) for the defendant.

E. R. Anderson & A. M. Pinkham, for the plaintiff, were not called upon.

HAMMOND, J. This is an action of tort for personal injuries received by reason of being knocked down on the cross walk on the southerly portion of Massachusetts Avenue in Boston on the easterly side of Washington Street, by a horse and buggy driven by the defendant, in the daytime of July 19, 1901. It was not disputed at the trial that the plaintiff was knocked down by a team driven by the defendant, and the only questions were whether the plaintiff was careful and the defendant careless.

The plaintiff testified that when she came to the southerly crossing of Washington Street and Massachusetts Avenue "she stood and looked to the right and to the left; that she did not

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see any carriage or anything that would stop her crossing, but saw a car going slowly up Washington Street toward Roxbury; that she proceeded to walk along in the same direction the car was going; that when in the middle of the crossing she was thrown down and became unconscious; that she did not see any carriage strike her." She further testified that "as she came along Washington Street and came to the down town corner of Massachusetts Avenue and before she started to cross at all, she stood and looked at each side to make sure there was nothing to hinder her crossing the street; that she did not see anything to hinder; that she then walked across the first driveway and the grass plot; that when she got to the other side of the grass plot she stood and looked and could see nothing to hinder her crossing the street; that she then walked right along until she was thrown down." Upon cross-examination she testified that she looked both ways on Massachusetts Avenue and did not see any horse and team coming, and the first thing she knew she was struck and knocked down. It is manifest that upon this evidence the question of her due care was for the jury.

The defendant strenuously contends that "a careful analysis of the whole evidence makes it clear that the injuries sustained by the plaintiff were the result of circumstances for which he was not responsible; that there was no sufficient evidence that his conduct toward the plaintiff was negligent conduct; that, putting it conservatively, the evidence was at least as consistent with due care as with negligence on his part; and that, therefore, the case should not have been submitted to the jury"; and in support of that contention his counsel has made an elaborate argument.

We have tried to make that "careful analysis" and find ourselves unable to agree with the defendant's contention. There is some conflict in the evidence, and various views, some favorable to the plaintiff and some to the defendant, might be entertained as to the cause of the accident. With some slight modification we accept the views set forth in the brief of the plaintiff as to what the evidence warranted the jury in finding. The jury might have found that the defendant, knowing that his horse was liable to be excited by the passage of trains upon the elevated structure and when so excited was liable to quicken

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his pace, drove toward the structure which was plainly in sight for a considerable distance away, making no effort to anticipate the trouble likely to arise, but driving in an ordinary way with a loose rein; that the horse became nervous and that by reason of the looseness of the reins the defendant, although he drew the reins so that his hands were up to his shoulders, was unable to get proper control of the horse in time to avert the collision with the plaintiff.* Upon such a finding the jury might conclude that the accident was due to the negligent conduct of the defendant in thus driving such a horse while approaching such a place. Or the jury might have taken another view of the evidence and found that notwithstanding the looseness of the reins and the sudden starting of the horse the defendant did get control of the horse before crossing Washington Street; that before reaching the plaintiff the horse was going only six miles an hour and trotting in such a manner as not to have done any injury to the plaintiff upon the cross walk if the defendant had used ordinary care in guiding him; that the defendant, instead of guiding towards the left thereby avoiding a collision, guided towards the right, thereby causing the accident; and that in this way the defendant was negligent.

The case was properly submitted to the jury.

Exceptions overruled.

* The frightening of the horse was described by the defendant as follows: "I was driving in a Goddard buggy with the curtains down and the top lifted back one reach. I was alone, driving along Massachusetts Avenue. At that time the elevated road over Washington Street at Massachusetts Avenue had been in operation only about a month. As I approached Washington Street I had one rein in each hand and was driving slowly, quietly trotting at the usual gait of the horse. Q. As you approached the crossing of Washington Street and Massachusetts Avenue what if anything happened? A. An elevated train came into sight suddenly around the corner of the building in front of and fairly over the horse's head. The elevated station between Northampton Street and Massachusetts Avenue was at my right. The train was coming from Roxbury, and was coming to a stop. — Q. What happened then? A. The horse suddenly jumped forward and made a bolt to get out of the way, apparently."

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CHARLES G. SMITH *vs.* CITY OF BOSTON.

Suffolk. November 16, 1906. — January 4, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Judgment. Certiorari. Tax, Sewer assessments. *Sewer. Boston.*

A decision of this court on a petition for a writ of certiorari to quash a sewer assessment made under a statute alleged to be unconstitutional, refusing to grant the writ on the ground that, assuming the law to be unconstitutional, yet because of the laches of the petitioner and the circumstances of the case substantial justice did not require the quashing of the assessment on that petition, in no way sustains the validity of the statute, and cannot be used to defeat an action seasonably brought by the owner of other land affected by the same assessment to recover the amount of such assessment paid by him under protest on the ground that the statute is unconstitutional.

An assessment for sewer construction in the city of Boston made in 1898 under St. 1891, c. 323, and acts in amendment or addition thereto, and not reassessed under St. 1902, c. 527, is void, and a sum of money paid under protest upon such an assessment may be recovered from the city of Boston, although the assessment was made under the same order as the assessment disputed in *Harwood* v. *Donovan*, 188 Mass. 487, where this court refused, in view of the laches of the petitioner and the circumstances of that case, to grant a writ of certiorari to quash the assessment.

CONTRACT against the city of Boston for a sewer assessment paid under protest. Writ dated October 25, 1904.

In the Superior Court the case was tried before *Bell*, J., without a jury, on certain agreed facts and evidence offered by the defendant. The assessment was for a sewer in Blue Hill Avenue and was made under the same order which was before this court in the case of *Harwood* v. *Donovan*, 188 Mass. 487, although upon a different lot.

The facts agreed were as follows:

On June 29, 1895, and December 27, 1895, the board of street commissioners of the city of Boston passed certain orders, declared to be under St. 1891, c. 323, and acts in amendment or addition thereto, ordering the construction of a portion of Blue Hill Avenue and of a sewer therein. The work was completed by the superintendent of streets of that city on August 18, 1898, and on that date the superintendent of streets made an order of assessment which assessed upon the land of the plaintiff's predecessor in title, one Grant, the sums of $526.31 and $91.47.

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The board of aldermen of the city of Boston never ordered the construction of the sewer referred to in the above order. The land so purporting to be assessed came by mesne conveyance to the plaintiff, who received a deed thereof on May 5, 1904.

On October 15, 1904, the plaintiff paid to the city of Boston under written protest the sums of $389.47 and $67.15, being the unpaid balance of the assessments upon his land. The plaintiff personally has never, nor have any of his predecessors in title to the lot, or any part of it, made any entry into or use of the sewer. One McDevitt, being the owner of a lot fronting on Blue Hill Avenue under a deed from the plaintiff, on November 21, 1904, applied for a permit to enter, and did enter, a drain from his lot into the sewer.

In doing the work in the construction of the sewer the superintendent of streets made contracts to the number of sixteen, under which the amount paid the contractors was $58,585.52. The total cost of the sewer was $90,379.64. The excess over the amount paid the contractors was expended by the city without contract, except that the materials furnished by the city therefor were bought by contract in large quantities after advertisement and furnished to and charged to the work at contract prices.

The plaintiff's predecessor in title had, by deed dated May 24, 1893, conveyed to the city of Boston so much of the parcels of land then owned by him as lay within the limits of Blue Hill Avenue as laid out under the orders for a public highway, which deed contains the following condition: "The condition upon which this release and conveyance is made and accepted is that any betterments on account of relocating, establishing the grade of, and constructing said street as aforesaid assessed upon any estate owned by the undersigned shall be assumed by the city of Boston, and the undersigned saved harmless therefrom."

The defendant offered evidence tending to show that the benefit from the construction of the sewer to the petitioner's land was greater than the assessment. This was all the evidence offered by either party besides the agreed facts.

At the close of the evidence the defendant asked the judge

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to rule that on all the evidence the plaintiff was not entitled to recover. The judge refused so to rule, and found for the plaintiff in the sum of $484.02; and the defendant alleged exceptions.

P. Nichols, for the defendant.

W. Bolster, for the plaintiff, submitted a brief.

SHELDON, J. In view of the decisions of this court, it is not now disputed that the statutes under which the assessment in question was laid were unconstitutional and void so far as they purported to authorize such an assessment. St. 1891, c. 323. *Lorden* v. *Coffey*, 178 Mass. 489. *Harwood* v. *Street Commissioners*, 183 Mass. 348. St. 1892, c. 418. *White* v. *Gove*, 183 Mass. 333. St. 1897, c. 426. *Sears* v. *Street Commissioners*, 173 Mass. 350. And it was decided in *Dexter* v. *Boston*, 176 Mass. 247, that under such circumstances a sewer assessment which has been paid, as here, under protest, may be recovered back in an action of contract. Such assessments have been not infrequently avoided on collateral proceedings. *Lorden* v. *Coffey*, 178 Mass. 489. *Ahearn* v. *County of Middlesex*, 182 Mass. 518. *White* v. *Gove*, 183 Mass. 333. These principles would be sufficient to entitle the plaintiff to recover if nothing more appeared.

But this assessment was made in August, 1898; and in July, 1904, one Harwood, the owner of other land affected thereby, brought a petition for a writ of certiorari to quash the assessment, upon the same grounds which are now relied upon; and this court, though assuming the validity of those contentions, declined to issue the writ and dismissed the petition, holding that certiorari was not a writ of right, and that in view of the petitioner's laches and the circumstances of that case, substantial justice did not require the quashing of the assessment. *Harwood* v. *Donovan*, 188 Mass. 487. The defendant's counsel now contends that the decision of that case was tantamount to a judgment sustaining the validity of the assessment by which all parties, including the plaintiff in the case at bar, are bound. He relies upon some expressions in the opinions of the court in the cases of *Brewer* v. *Boston*, *Clinton & Fitchburg Railroad*, 118 Mass. 52, 57, and *Taber* v. *New Bedford*, 135 Mass. 162, 164. He argues further that the plaintiff must show that this assessment was void not only when laid, but also on the day of its

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payment in October, 1904, and that on this last date, though vulnerable at first, it had under the decision of this court in *Harwood* v. *Donovan*, *ubi supra*, become crystallized by lapse of time and general acquiescence into complete validity.

The fallacy of the defendant's argument is that it rests upon the assumption that the court by its decision in *Harwood* v. *Donovan* sustained the validity of the assessment in question. But this is not so; on the contrary, the court assumed its invalidity and simply declined to quash it upon the request of that petitioner. If the assessment had been merely voidable and so good until it should be quashed, doubtless this result would have taken nothing from its validity and would have left it in full force and effect. But it was more than voidable; it was void from the beginning, as appears by the cases already referred to. The superintendent of streets had no jurisdiction to make this order. The effect of the decision in *Harwood* v. *Donovan* was simply to leave the assessment in its original position, not to endow it with any new strength. This order stands on exactly the same footing as an order made by county commissioners; and the distinction between an order or adjudication of such a tribunal which is only voidable and one which is utterly void was pointed out in the recent case of *Ahearn* v. *County of Middlesex*, 182 Mass. 518. In the opinion in that case Knowlton, C. J. said: "It never has been held that proceedings wholly outside the jurisdiction of a board of county commissioners would be held good until set aside upon a writ of certiorari. The distinction lies between proceedings which are irregular, informal, and erroneous in matters within their jurisdiction, and those that are void because done without jurisdiction. It would hardly be contended that action of such a tribunal under an unconstitutional statute would be held unimpeachable in collateral proceedings." In that very case the court had declined to quash the proceedings of the county commissioners upon a petition for a writ of certiorari; *Watertown* v. *County Commissioners*, 176 Mass. 22; and yet it overthrew their order upon a collateral proceeding in the case just referred to of *Ahearn* v. *County of Middlesex*, 182 Mass. 518.

The defendant has properly not claimed that it is of any consequence whether the actual benefit to the petitioner's land from

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the construction of the sewer did or did not exceed the amount of the assessment, or that there is any materiality in the fact that a person claiming under the plaintiff has since the rights of the parties became fixed made use of the sewer. And it should be added that this special tax has not been, if it could have been, reassessed under St. 1902, c. 527, and no question arises as to what the effect of such a reassessment would have been. *Warren* v. *Street Commissioners*, 187 Mass. 290. *Maloy* v. *Holl*, 190 Mass. 277.

Exceptions overruled.

FRANK F. GERRY *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. November 19, 1906. — January 4, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence. Railroad.

In an action against a railroad company for injuries to the plaintiff's horse caused by his being frightened by a freight train of the defendant when standing near the track as the train approached, it is no evidence of negligence on the part of the defendant that the train was running faster than was allowed by the regulations approved by the railroad commissioners, even if the rate of speed had anything to do with the accident, as such regulations are made for the safety of the trains and in no way affect the duty of the railroad company toward the owner of the horse.

In an action against a railroad company for injuries to the plaintiff's horse caused by his being frightened by a freight train of the defendant when standing near the track as the train approached, the fact that the train made a noise is no evidence of negligence on the part of the defendant, if it does not appear that the train made any more noise than reasonably might be expected of such a train or that the noise that was made was due to any negligent act.

R. L. c. 111, § 120, requiring a railroad company to erect and maintain suitable fences upon both sides of its railroad, is intended only for the protection of the owners of adjoining lands, and imposes no duty on a railroad company to enclose any part of a freight yard so as to protect horses standing near its tracks from being frightened by freight trains.

TORT for the loss of the plaintiff's horse and for personal injuries alleged to have been caused by the negligence of the servants of the defendant. Writ dated July 2, 1903.

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In the Superior Court the case was tried before *Richardson*, J., who at the close of the plaintiff's evidence ordered a verdict for the defendant, and reported the case for determination by this court. If the ruling was correct the verdict was to stand; otherwise, judgment was to be entered for the plaintiff for $200 damages and costs.

From the report it appeared that the accident happened on April 7, 1903, at South Sudbury. The plaintiff had come out from Boston on the train reaching South Sudbury at half past twelve o'clock and his wife was there to meet him with the horse and a Concord top buggy. The plaintiff described the accident as follows:

"I had some freight in the station in bags. I went into the passenger station to pay the freight and asked my wife to drive around to the freight station which she did. After paying the freight I went over to the freight house and took the truck and carried one bag out to the platform and went in for the other. I think I had just got the other bag on the truck, or was putting it on, when I heard this train coming, and it sounded as if it was coming very fast, and I knew my wife was out at the side of the track, and I rushed out immediately and took hold of the horse's bit. The noise I heard sounded like a rapidly approaching train, and if my horse had been farther away from the track possibly I shouldn't have thought of getting hold of him so quick, but I knew he was close to the track and I went to lead him away. When I first heard the noise I was inside of the door, perhaps twenty feet from the horse, and just as I got hold of him or about that time — it all happened very suddenly — the train struck the junction, and the engineer whistled and I really didn't have time to turn the horse, get him pointed away from the train: he was then pointed south, the same direction the train was going so that the train came up partially behind him. The train was going very rapidly and made a very loud noise, and the horse began to get more frightened every moment; I exerted all my strength to hold him and he kept dragging me closer to the train and finally when I was very close to it I didn't dare to hold him any longer, and let go and he reared up and went into the train. The train struck him and broke his leg and his jaw. I think that day there

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were two or three piles of sleepers which had been taken out of the track and when I jumped back I fell over them in some way and sprained my ankle very badly. My wife was in the carriage all this time."

The train that frightened the plaintiff's horse as above described was a freight train. The plaintiff further testified:

"It could have been but a very few seconds from the time I first heard the noise of the on-coming train until I reached the horse. The train as I remember it seemed to be a very long train, and even going at the rate of speed it was it took quite a while to get by, or so it seemed to me at the time. I didn't count the cars but it was a very long train."

J. O. Teele, for the plaintiff.

J. L. Hall, for the defendant.

HAMMOND, J. Whatever may be thought of the conduct of the plaintiff in leaving his horse at a place immediately adjoining the railroad track, where he must have known that trains might approach at any time, when he might have selected a safer place, we think that the ruling that the plaintiff could not recover should stand upon the ground that the accident is not shown to have been due to any negligence of the defendant.

The plaintiff seems to rely upon the speed of the train as showing negligence, but it is not shown that the speed as such was unusual. If it be contended that it was faster than allowed by the regulations approved by the railroad commissioners and that this fact of itself is evidence of negligence, the answer is that these regulations were made for the safety of the trains and they in no respect altered or affected the duty owed to one in the situation of the plaintiff. Moreover it is the merest conjecture whether the speed of the train had anything whatever to do with the accident. The plaintiff also complains of the noise of the train, but trains always make noise, and there is no evidence that this train made any more noise than may be reasonably expected of such a train, much less that the noise was due to any negligent act of the defendant.

As to the contention of the plaintiff that he had the right to go to the jury on the question of the negligence of the defendant in the matter of fences and barriers, the answer is that in so far as this contention is based upon the statute requiring fences

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and barriers to be put up along the line of the railroad, the statute was intended only for the protection of adjoining owners; Pub. Sts. c. 112, § 115; R. L. c. 111, § 120; *Byrnes* v. *Boston & Maine Railroad*, 181 Mass. 322, and cases there cited; and in so far as it rests upon other grounds there is no evidence of negligence. Such an arrangement of track and freight yards is of common occurrence in the country.

Judgment on the verdict.

JENNIE E. CUSHMAN *vs.* LEWIS N. CUSHMAN.

Middlesex. November 20, 1906. — January 4, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Marriage and Divorce.

Where to a libel by a wife for divorce on the ground of adultery the husband by way of recrimination sets up previous desertion on the part of the libellant, and the trial judge finds that the charge of adultery is sustained and that the charge of desertion is not sustained, he should grant the divorce, and it is error for him to order that the libel be dismissed on the ground that, although the conduct of the libellant did not amount to desertion, "there was on her part such unmindfulness of marital obligations as to preclude the granting of her libel."

LIBEL FOR DIVORCE, by Jennie E. Cushman against Lewis N. Cushman, filed June 21, 1904, charging the libellee with adultery committed at Hubbardston on or about June 15, 1904.

There was a previous libel by Lewis N. Cushman *v.* Jennie E. Cushman, dated February 8, 1904, alleging desertion on or about January 3, 1901.

In the Superior Court the cases were heard by *Aiken*, C. J. He found that Lewis N. Cushman committed adultery at Hubbardston on June 15, 1904, with the person named in his wife's libel, and by reason of that misconduct ordered that his libel be dismissed. Upon the wife's libel, after stating the facts, the Chief Justice concluded as follows:

"While I do not find her conduct amounted to desertion, I do find that there was on her part such unmindfulness of marital

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obligations as to preclude the granting of her libel and I order the same dismissed."

To this order the libellant alleged exceptions, raising only the question whether on the facts found the libel as matter of law could be dismissed.

S. J. Elder, (*F. E. Bradbury* with him,) for the libellant Jennie E. Cushman.

E. R. Anderson, for the libellee Lewis N. Cushman, submitted his case to the court without argument and without a brief.

HAMMOND, J. To a libel of the wife for divorce on the ground of adultery the husband filed an answer denying the adultery and setting up by way of recrimination previous desertion on the part of the wife. At the trial the judge found that the husband was guilty of the adultery. But as to the charge of desertion he did not find that the wife's conduct amounted to desertion, although he did find "that there was on her part such unmindfulness of marital obligations as to preclude the granting of her libel," and ordered it to be dismissed. In other words, the wife's charge of adultery was sustained but the husband's charge of desertion was not.

However it may be elsewhere, the rule in this Commonwealth is that while the offence set up in recrimination need not be of the same nature as the one relied upon in the libel, yet it must be such as in law would be of itself sufficient ground for divorce. *Hall* v. *Hall*, 4 Allen, 39. *Clapp* v. *Clapp*, 97 Mass. 531. *Watts* v. *Watts*, 160 Mass. 464. *Walker* v. *Walker*, 172 Mass. 82, and cases there cited. If upon the evidence the judge had found desertion, the dismissal of the libel would have been correct; but he did not find it, and there is nothing in the facts found by him as to the conduct of the wife which estopped her from a divorce on the ground of the husband's adultery. This case does not belong to the class of which *Lyster* v. *Lyster*, 111 Mass. 327, is a type, where the libellee attempts to justify the charge alleged in the libel (in that case it was desertion) by showing misconduct on the part of the libellant which, although not sufficient in law to constitute a ground of divorce, may yet be sufficient in law to justify the act relied upon in the libel. *Watts* v. *Watts*, *ubi supra*. In the case before us a separate and distinct offence on the part of the libellee, having no relation to

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the offence charged, is set up as a bar to the libel. In such a case, as has been before stated, the offence set up must be sufficient of itself to constitute a ground of divorce.

Exceptions sustained.

CAROLINE V. WOODVINE *vs.* ROBERT C. DEAN & another. SAME *vs.* HORTENSE W. DEAN & another.

Suffolk. November 21, 1906. — January 4, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Devise and Legacy. Will. Child. Land Court. Superior Court. Jurisdiction. Statute. Practice, Civil.

Under R. L. c. 135, § 19, the question whether the omission of a testator to provide for his children in his will was intentional is a question of fact.

On a petition to the Land Court to establish a title to land devised to the petitioner to the exclusion of the testator's children, for whom no provision was made in his will, that court has jurisdiction to decide the question of fact whether the omission of the testator to provide for his children was intentional.

Upon an appeal to the Superior Court from the Land Court on the issue whether the omission of the testator, under whose will the petitioner claims title to the land which he seeks to have registered, to provide in his will for his children was intentional under R. L. c. 135, § 19, the Superior Court has jurisdiction to decide this question of fact.

St. 1905, c. 288, providing that on an appeal from the Land Court to the Superior Court the judge who rendered the decision appealed from shall file in the Superior Court a full report of his decision, which shall be *prima facie* evidence as to the matters therein contained, relates only to procedure as to evidence, and is applicable to the trial of an issue in an appeal to the Superior Court in a case which was begun by a petition filed in the Land Court before the passage of the statute but in which the decision appealed from was not given until after the statute took effect.

St. 1905, c. 288, provides that on an appeal from the Land Court to the Superior Court the judge who rendered the decision appealed from shall file in the Superior Court "a full report of his decision and of the facts found by him so far as they relate to or bear upon any questions involved in the appeal." On such an appeal the only question in controversy was whether the omission of the testator under whom the petitioner claimed to provide in his will for his children was intentional, and the report of the judge after stating the issue was in these words: "At the trial before me the only testimony in the case was to the effect that such omission was intentional, and I so found." *Held*, that the report was sufficiently full for the purposes for which it was made, and was in substantial compliance with the requirements of the statute.

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HAMMOND, J. In the original act establishing the Land Court there was no provision for the revision by this court of questions of law arising in that court. Questions of law arising upon trial in the Superior Court on an appeal from the Land Court might be brought here "in the same manner as in proceedings at law in said [Superior] court." St. 1898, c. 562, § 14, now R. L. c. 128, § 13. A subsequent statute provided that questions of law arising in the Land Court might be taken directly to this court for revision in the same manner as questions of law are taken to this court from the Superior Court. St. 1899, c. 131, § 2, now R. L. c. 128, § 13. In the case before us there are two bills of exceptions, one arising out of the hearing in the Land Court and one out of the trial in the Superior Court. The first bill raises only one question, and that is one of jurisdiction.

Denton G. Woodvine devised the land in question to the petitioner, who was his wife, and in his will he made no provision for his children, of whom Hortense W. Dean, who hereinafter will be designated as the respondent, was one. As to the title the crucial and only question was whether this omission was intentional. If it was, then the petitioner's title was good as against the respondent; otherwise it was not. R. L. c. 135, § 19. This was plainly a question of fact. At the hearing before the Land Court the respondent asked for a ruling that the court had no jurisdiction in regard to this issue. The judge refused so to rule, and proceeded to the trial of the issue. He found as a fact that the omission was intentional and ordered a decree for registration of title in the petitioner. The respondent excepted to the refusal to rule as requested, and appealed from the "decision" of the Land Court to the Superior Court, "to the extent, and in so far as appears in the issues filed herewith to be tried in said Superior Court." The only issue "filed herewith" was the following: "Whether or not the omission of Denton G. Woodvine, under whose will said petitioner claims title to the land which she seeks to have registered in this proceeding, to provide in said will for his children was intentional and not occasioned by accident or mistake, as provided in Chapter 135, Section 19 of the Revised Laws." Thus, for the time being, the proceedings in the Land Court

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were suspended, and the parties went to the Superior Court to try the issue above set forth.

The Land Court rightly refused the ruling requested. The question whether the omission was intentional was pivotal. The rights of the parties could not be determined without first settling it, and the proceeding was for the purpose of settling those rights. With certain exceptions, not here material, the decree finally to be entered in this case as to the nature and extent of the petitioner's title is "conclusive upon and against all persons." R. L. c. 128, § 37. That it is not only the right but the duty of a court engaged in such an inquiry, for such a purpose, to determine such a fact, is too plain for argument.

We now pass to the exceptions raised at the trial in the Superior Court upon the issue hereinbefore set forth. In so far as the respondent sought to raise there the same question as to jurisdiction as had been raised in the Land Court, she had no right to any ruling because that question was immaterial to the issue then on trial. In so far as she sought to raise a question as to the jurisdiction of the Superior Court it is manifest that since the Land Court had jurisdiction the appellate court, to whom the issue was submitted, also had jurisdiction.

At the trial the report of the Land Court made under St. 1905, c. 288, was offered in evidence by the petitioner and against the objection and exception of the respondent it was admitted. The respondent objects, first, that the statute providing for the admission of the report is inapplicable to this case because it went into effect on April 13, 1905, which was subsequent to the time (February 19, 1905) when the original petition was filed in the Land Court. The statute provides in substance that when an appeal is taken to the Superior Court for a jury trial on the facts, "the judge of the Land Court who rendered the decision . . . appealed from shall . . . file in said Superior Court a full report of his decision and of the facts found by him so far as they relate to or bear upon any questions involved in the appeal, and upon the trial of the cause in the Superior Court such report shall be *prima facie* evidence as to the matters therein contained."

It appears upon an inspection of the papers that the decision

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of the Land Court was not made until June, 1905, and the appeal to the Superior Court was not taken until the following month. At the time of the appeal, therefore, the statute was in force. It was not a statute changing the substantial rights of the parties, but simply the rules of evidence. It relates of course to future and not to past trials, and only to the procedure as to evidence. The language is broad enough to cover every future trial, and seems to be applicable to every such trial. The case is not to be classed with those where the statute changes the liability and rights of parties, as in *Shallow* v. *Salem*, 136 Mass. 136, and many other cases cited by the respondent. The statute being general in form, dealing only with a rule of evidence, and having reference only to civil cases, must be regarded as applicable to any future trial whether or not in a case pending at the time it took effect. The case must stand with cases like *Brooks* v. *Holden*, 175 Mass. 137, and *Stocker* v. *Foster*, 178 Mass. 591.

The second objection to the report is that it is not the "full report" required by the statute. In order to pass properly on this point it is necessary to consider the scope of the decision and of the issue to be tried in the Superior Court. The decision was that the omission in the will to provide for the testator's children was intentional. The statute does not require that the evidence before the Land Court should be reported, and the respondent does not contend to the contrary. The issue presented only one simple question of fact. The report sets out the decision of the court on that question and that the decision was arrived at after hearing testimony which was to the effect that the omission was intentional. The report is very brief and simple.* It might have been more elaborate,

* The report was filed on July 18, 1905, and was as follows:

"This is a petition for the registration of title to several parcels of land in Boston, formerly owned by Denton G. Woodvine late of said Boston. The only question in controversy is whether the omission by said Denton G. Woodvine to provide in his will for his children was an intentional omission.

"At the trial before me the only testimony in the case was to the effect that such omission was intentional, and I so found.

"C. T. Davis,
"Asso. Judge of the Land Court."

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setting out among other things the provisions of the will in detail and the number of children left by the testator, and the fact that the respondent was one of them. But as to all this there was no dispute. In view of the nature of the decision and the real question to be tried, we think that the report was sufficiently full for the purposes for which it was made, and was in substantial compliance with the requirements of the statute.

We understand that the exceptions as to evidence are waived.

Exceptions overruled.

R. W. Foster, for the respondents.

H. Dunham, for the petitioner, was not called upon.

MARY A. WILLIAMS & others, executors, *vs.* INHABITANTS OF BROOKLINE.

Norfolk. November 22, 1906. — January 4, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Tax. Partnership. Executor and Administrator. Estoppel.

Where articles of copartnership provide that on the death of one of the partners his share of the capital shall remain in the business for two years, the surviving partner paying interest thereon to the estate of the deceased partner, and, upon the death of one of the partners, the surviving partner agrees with the executor of the will of the deceased partner as to the balance due from the partnership to the testator which still is used under the agreement as part of the capital of the firm, the debt to the estate can be taxed in the hands of the executor as personal property, although this results in double taxation.

Where the executors of a will, who also are trustees thereunder, as executors pay under protest a tax on personal property consisting of a debt acknowledged by an instrument under seal made to them as executors, and represent to the assessors that their relation to the property is wholly as executors, on a petition for an abatement of the tax it is not open to them to contend that the tax is invalid because assessed to them as executors rather than as trustees.

PETITION, filed in the Superior Court for the county of Norfolk on January 3, 1906, by the executors of the will of Albert M. Williams, late of Brookline, for the abatement of a tax of $750, paid by the petitioners under protest, which was assessed to the petitioners as such executors on May 1, 1905, on $63,000 of personal property constituting part of the capital used in

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carrying on the business of the firm of Rousmaniere, Williams and Company.

The respondent demurred to the petition.

The petition alleged that the testator, Albert M. Williams, at the time of his decease was a resident of Brookline, and was a member of the firm of Rousmaniere, Williams and Company, carrying on business in Boston. By the articles of copartnership it was provided that, in case of the death of either partner during the term of five years for which the partnership was to continue, the share of such deceased partner in the capital of the firm should be retained in the business for the term of two years succeeding the date of his death, and that interest thereon should be paid to the widow or legal representative of such deceased partner at a specified rate, but that in all other respects the partnership should be dissolved by the death of either partner.

Albert M. Williams died on February 19, 1904, within the term of the copartnership, which would have expired on April 1, 1904. In May, 1904, the surviving members of the firm, who were continuing the business under the same firm name, entered into an agreement with the executors, and gave them an obligation under seal agreeing that the share to which the testator, Albert M. Williams, was entitled was $97,000 and that they would pay this sum in instalments on certain dates between October 1, 1904, and April 1, 1906, with interest at the rate of six per cent thereon, and upon any balance of the principal remaining unpaid.

At the time of the assessment in question, there remained unpaid the sum of $62,500 which was due under the terms of the sealed instrument.

The Superior Court made a decree sustaining the demurrer and ordering judgment for the respondent; and the petitioners appealed.

F. M. Forbush, for the petitioners.

W. D. Turner, for the respondent, was not called upon.

HAMMOND, J. The death of Williams dissolved the partnership in every other respect except that his share of the capital was to remain in the business for two years, the surviving partner to pay interest thereon at the rate of six per cent per

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annum. This was not a provision for the continuation of the business by the executor of the deceased partner, and there is much to be said in favor of the view that the intention of the parties was that the interest of the deceased partner should be regarded merely as a loan to the firm. But however that may be, there can be no doubt that by the agreement of May, 1904, the relation of partnership between the surviving partners and the estate was entirely severed, and that the sum due had taken the form of a debt owing from the surviving partners. It is the same in result as though the sum due the estate had been paid to the petitioners and then lent by them to the firm. That was the substance of the transaction.

It is said by the petitioners that this leads to double taxation, — a result which it is said courts are slow to reach. But the answer is that the taxation of a debt, especially where the debtor has property enough to pay, generally results in double taxation; and while it is true that in cases of debts secured by mortgages on taxable real estate the Legislature has made provision to relieve to some extent from double taxation, there still stands liability to double taxation in other kinds of debts.

Under the circumstances of this case we think that the question whether the tax is invalid by reason of being assessed to the petitioners as executors rather than as trustees is not open to the petitioners. They are executors and trustees under the will, and seem to have considered this property as held by themselves as executors, and so represented to the assessors. It is not a case where the property is not taxable, as in *Milford Water Co.* v. *Hopkinton*, 192 Mass. 491.

Judgment affirmed.

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DELIA LEE *vs.* ANNIE L. TARPLIN & another.

Suffolk. December 12, 1906. — January 4, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Bankruptcy.

By the express provisions of the bankruptcy law of 1898 the debt created by a judgment in an action of tort for obtaining property by false representations is not barred by a discharge in bankruptcy.

HAMMOND, J. This is an appeal from a decree reaching and applying toward the payment of a judgment debt due from the defendant Samuel Tarplin to the plaintiff, a certain parcel of land the record title to which stands in the name of the defendant Annie L. Tarplin, the wife of Samuel. The evidence not being reported, the only question is whether the facts found by the trial judge and reported to this court under the statute will support the decree.

Upon an inspection of these facts there can be but one answer. It is perfectly clear that the original liability of Samuel Tarplin was for obtaining property by false representations, and it is equally clear that under the bankruptcy statutes the judgment founded thereon is also to be regarded as such a liability. Lowell on Bankruptcy, § 435, and cases cited. *Warner* v. *Cronkhite*, 6 Bissell, 453. *In re Whitehouse*, 1 Lowell, 429. *In re Patterson*, 2 Bened. 155. The debtor therefore was not released from it by his discharge in bankruptcy. U. S. St. of 1898, c. 541, (as amended by the U. S. St. of 1903, c. 487,) § 17, a, 2.

It is also clear that the real estate described in the decree is held by Annie in fraud of the creditors of her husband Samuel. The facts support the decree.

The plaintiff moves for double costs, and, in view of the frivolous nature of the appeal, the motion is granted. The interlocutory and final decrees are both affirmed, with double costs; and it is

So ordered.

D. B. Beard, for the defendants.

H. F. Lyman, for the plaintiff, was not called upon.

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FRANK B. DOW, petitioner, *vs.* JAMES B. CASEY.
FISHER H. PEARSON, petitioner, *vs.* SAME.
LAFOREST BEALS, petitioner, *vs.* SAME.
FRANK B. DOW *vs.* SAME.
FISHER H. PEARSON *vs.* SAME.
LAFOREST BEALS *vs.* SAME.

Middlesex. November 23, 1906. — January 8, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Superior Court. Municipal Corporations. Practice, Civil, Exceptions. *Words,* "Appeal," "Civil cause."

In the provisions of R. L. c. 100, § 4, that a member of a licensing board of a city, if removed by the mayor, may apply to the Superior Court for a review of the charges, of the evidence submitted thereunder and of the findings thereon by the mayor, that "the court, after a hearing, shall affirm or revoke the order of the mayor removing such commissioner, and there shall be no appeal from his decision," the word "appeal" is used in a general sense which includes all proceedings for a revision by a higher court, and there is no right of exception to the rulings of the judge, whose decision is final.

Whether a proceeding against a public officer for his removal from office on charges of misconduct is a "civil cause" within the meaning of R. L. c. 173, § 100, giving a right to take exceptions, *quaere.*

KNOWLTON, C. J. These six cases all present the same questions. The first three are petitions to prove exceptions, and each of the last three is an appeal from an order of the Superior Court affirming an order of the mayor of Lowell removing the applicant for a review from his office as a member of the board of police of the city of Lowell, which order of the Superior Court includes an order disallowing exceptions taken by the applicant. The three applicants, after a hearing, were removed by the mayor from their respective offices as members of the police board of Lowell.* Each of them then filed in the Superior Court, under R. L. c. 100, § 4, an application for a review of

* By St. 1895, c. 187, the name of the license commission of Lowell was changed to "the board of police of the city of Lowell." The commissioners were given control of the police force, and were to remain in continuous service without reference to the vote of the city on the question of granting licenses for the sale of intoxicating liquors.

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the charges against him, the evidence submitted thereunder, and the findings thereon by the mayor.

At the hearing in the Superior Court on these applications each of the applicants requested certain rulings, and took an exception to the refusal of the judge to give them. The fundamental question is whether this refusal was a subject for an exception, and whether the order affirming the order of the mayor and disallowing the exceptions may be appealed from to this court.

The section of the statute just referred to provides for the removal of license commissioners by the mayor for cause, "after charges preferred, reasonable notice thereof, and a hearing thereon; and the mayor shall, in the order of removal, state his reasons therefor." The record shows that a full hearing, occupying many days, was had before the mayor, after general charges had been preferred against the commissioners, of which they had notice in writing, and that they were personally present, and were represented by able counsel at the hearing. The mayor, in connection with his order for a removal, stated his reasons therefor in writing. No objection was made at the hearing in regard to the form of the charges, their sufficiency, or the notice of the hearing upon them. The requests for rulings at the hearing in the Superior Court all relate to the preferring of charges, their sufficiency, the notices given to the license commissioners, and the legality of the hearing upon such charges with such notices. The judge of the Superior Court made full findings of fact in regard to the matters covered by the requests.

The section of the statute referred to above closes with these words: "The court, after a hearing, shall affirm or revoke the order of the mayor removing such commissioner, and there shall be no appeal from his decision." The question is whether this language makes the decision of the Superior Court final on all matters of law and of fact, or whether it leaves open to either party a right to take exceptions on questions of law, and to carry these questions to the Supreme Judicial Court.

We are of opinion that the decision of the Superior Court is final. It is only a commissioner who has been ordered removed that can apply to the Superior Court for a review. Persons pre-

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ferring charges are bound by an adverse decision of the mayor. It is only upon the concurrence of the Superior Court with the order of the mayor that there can be a removal of one who has applied to the Superior Court for a review. It is questionable whether a proceeding against a public officer for his removal from office upon charges of misconduct is a "civil cause" within the meaning of the words in R. L. c. 173, § 106, giving a right to take exceptions. But even if it is, we are of opinion that R. L. c. 100, § 4, deprives both parties of the right to except by making the decision of the Superior Court final. We think the word "appeal" is used in a broad general sense, so as to cover all proceedings for a revision by a higher court. In that view of the section the applicant is not aggrieved by any ruling of the Superior Court, because such ruling is binding upon him.

There are important reasons why the right of removal of such a public officer for cause should be vested in some magistrate or tribunal whose decision shall be effective without the delays often incident to appeals and proceedings by exceptions. It would be unfortunate if an officer who had twice been found guilty of official misconduct requiring his removal, once by the mayor and again by the Superior Court, should be able to prevent effectual action by exceptions which might cause long delay. It would be unfortunate if, after the Superior Court had found that the charges were not sustained, the persons preferring them could keep the matter open and the commissioner under attack by taking exceptions. It was to prevent delays in such cases that the legislative provision was made. The prohibition of an appeal includes a prohibition of an application for a revision of the decision upon a bill of exceptions.

The result is that in each of the first three cases the petition is dismissed, and in each of the last three the appeal is dismissed.

So ordered.

N. D. Pratt, (*J. J. Devine & R. J. Crowley* with him,) for Dow.

G. W. Pearson, for Fisher H. Pearson.

J. C. Burke, for Beals.

J. G. Hill, for the respondent.

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ATTORNEY GENERAL *vs.* FRANK B. STRATTON & others.

Essex. November 8, 9, 1906. — February 11, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Municipal Corporations. Board of Health, Municipal.

In the cities and towns of this Commonwealth there is no power to remove public officers except that which is given by the statutes.

Public officers, even when elected by the voters of a town to perform statutory duties which involve the expenditure of money properly raised by local taxation, are not the agents of the town.

The members of the board of health of a town cannot be removed by a vote of the inhabitants of the town.

KNOWLTON, C. J. This is an information in the nature of a *quo warranto* to require the respondents to show by what warrant and authority they exercise the office of members of the board of health of the town of Swampscott.

It appears that the inhabitants of the town, at the annual town meeting in March, 1906, which was called for many purposes, and among others to hear and act upon the reports of numerous town officers, including the report of the board of health, appointed a committee of five voters to investigate the doings of the board of health for the three municipal years then ending, with authority to call for persons, books and papers, and to employ counsel and a stenographer. At an adjourned meeting this committee made a report, with charges against the board of health, which was accepted and adopted. At this meeting another committee was appointed to hear evidence upon the charges against the board, and to report their findings of fact and recommendations at an adjourned town meeting. This committee were authorized to employ counsel and engage a stenographer, and were empowered to summon witnesses, and call for an inspection of public records and private documents and papers. The committee made a report at an adjourned meeting, finding the charges proved, and recommending the adoption of resolutions removing the respondents from their respective offices as members of the board of health, for maladministration and misfeasance in office. The report was accepted and adopted, and resolutions were adopted in accordance

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with its recommendations. The respondents did not recognize the authority of either of these committees, and did not appear before them, although each of the committees met the respondents at their office, and interrogated them in regard to their books, records and memoranda, which were there inspected.

The respondents also offered to show, at the hearing upon the information, that the committees were affected by bias and prejudice against them, such that their proceedings were not fairly conducted, and that the attempted removal of the respondents from their office was illegal by reason of other specified irregularities in connection with the meeting at which the vote of removal was passed. This offer of proof was rejected by the justice who heard the case. He ordered that the petition be dismissed, and reported the case to the full court. The justice made a memorandum of his findings and rulings as follows: "The members of the board of health are public agents invested with great public powers. Their term of office is prescribed by the Legislature. Each member holds his office for three years from the day following the meeting at which he is elected and until another is chosen and qualified in his stead. R. L. c. 11, § 338. I rule as matter of law that the power to shorten this term even for misconduct, official or otherwise, is not vested in the voters of the town in town meeting assembled, and, having so ruled, order that this petition be dismissed."

The question whether this ruling was correct is the only question presented in terms by the report. Although the general language of the reservation may be broad enough to authorize a dismissal of the petition on the ground that the vote of removal was void, because there was no article in the warrant which gave notice to the voters that such a subject was to be acted upon at the meeting, (see *Wood* v. *Quincy*, 11 Cush. 487, 495, *Matthews* v. *Westborough*, 131 Mass. 521,) we think it better not to dispose of the case on this ground, inasmuch as the term of office of neither of the respondents has yet expired. The three terms for which they were respectively elected will end in March, 1907, March, 1908, and March, 1909. The question expressly reserved has been fully argued, and, if not decided in this case, it may arise in subsequent proceedings against these respondents for the causes now existing.

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It is contended by the informant that, at the common law, municipal corporations have an inherent power of amotion of their officers for misconduct. This rule has been laid down in cases relating to certain municipal corporations in England. *Rex* v. *Richardson*, 1 Burr. 517. *Lord Bruce's case*, Stra. 819. *Regina* v. *Ipswich Corp.* 2 Ld. Raym. 1232. *Imperial Hydropathic Hotel Co.* v. *Hampson*, 23 Ch. D. 1, 7. In this country the subject is generally regulated by legislation, although there are cases in which the above rule has been stated as applying to officers of municipal corporations, in the absence of statutory provision touching the subject. *State* v. *Jersey City*, 1 Dutch. 536, 539. *Richards* v. *Clarksburg*, 30 W. Va. 491. *Ellison* v. *Raleigh*, 89 N. C. 125. *Mayor of Savannah* v. *Grayson*, 104 Ga. 105. *State* v. *New Orleans*, 107 La. 632. In other cases relating to corporations aggregate, not municipal, but having authority for their own government, the rule has been stated in general terms, although the decisions well might have been put on the ground of an original implied authority, given by the statute creating the corporations. See *Fawcett* v. *Charles*, 13 Wend. 473, 476; *People* v. *Chicago Board of Trade*, 45 Ill. 114. Whatever the rule may be in reference to municipal corporations in other parts of the country, we are of opinion that, in the cities and towns of Massachusetts, there is no power to remove public officers except that which is given by the statutes. The difference between municipal corporations in England and towns in New England has been recognized in many cases. The former often have many prescriptive rights, as well as special powers expressly or impliedly given in their charters, while the latter have only the powers conferred by statutes. In *Stetson* v. *Kempton*, 13 Mass. 272, 278, Chief Justice Parker, referring to towns, said: "Their corporate powers depend upon legislative charter or grant; or upon prescription, where they may have exercised the powers anciently without any particular act of incorporation. But, in all cases, the powers of towns are defined by the statute of 1785, c. 75." In *Hooper* v. *Emery*, 14 Maine, 375, the court said: "'The inhabitants of every town in this State are declared to be a body politic and corporate' by the statute; but these corporations derive none of their powers from, nor are any duties imposed upon them by, the common law." In the opinion

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by Mr. Justice Gray in *Bloomfield* v. *Charter Oak Bank*, 121 U. S. 121, 129, we find these words: "Towns in Connecticut, and in the other New England States, differ from trading companies, and even from municipal corporations elsewhere. They are territorial corporations, into which the State is divided by the Legislature, from time to time, at its discretion, for political purposes and the convenient administration of government; they have those powers only, which have been expressly conferred upon them by statute, or which are necessary for conducting municipal affairs; and all the inhabitants of a town are members of the *quasi* corporation." Similar language was used by the same judge in *Hill* v. *Boston*, 122 Mass. 344, 354, and in *Agawam* v. *Hampden*, 130 Mass. 528, 530, when Chief Justice of this court. See statements to the same effect in *Eastman* v. *Meredith*, 36 N. H. 284, and in *Ottawa* v. *Carey*, 108 U. S. 110, 121. Chief Justice Bigelow in *Walcott* v. *Swampscott*, 1 Allen, 101, referring to public officers chosen by towns under the requirements of a statute, said, "Towns cannot direct or control them in the performance of these duties; they cannot remove them from office during the term for which they are chosen; they are not amenable to towns for the manner in which they discharge the trust reposed in them by law." In the opinion in *Waldron* v. *Haverhill*, 143 Mass. 582, 584, Mr. Justice Charles Allen says of surveyors of highways chosen by the town, "they are independent of the town, and cannot be directed, or controlled, or removed from office by the town."

Our statutes contain provisions for the removal of certain public officers. In cities members of the board of health may be removed by the mayor for cause. R. L. c. 75, § 9. Assessors of a town, if they fail to perform their duties, may be removed, virtually, by an appointment by the county commissioners of three persons to act as assessors, who supersede those regularly elected. R. L. c. 11, § 358. This is so, even where the selectmen are acting as assessors under the statute which requires them so to act if no other assessors are elected. Registrars of voters may be removed under the R. L. c. 11, §§ 28, 29. The appointment of police officers may be revoked by the selectmen of the town in which they are appointed. R. L. c. 25, § 94; c. 108, § 15. Election officers may be removed by the select-

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men of the town. R. L. c. 11, § 173. So may engineers of the fire department. R. L. c. 32, § 38. Licensing boards may be removed, although there is a right of review of the original proceedings by the Superior Court. R. L. c. 100, § 4. Provision is made for occasions when a treasurer or a collector of taxes is unable to perform his duties. R. L. c. 11, § 359. Against their misfeasance the town is protected by their bonds. Sheriffs, registers of probate, district attorneys and clerks of the several courts may be removed by the Supreme Judicial Court. R. L. c. 156, § 4. Members of either branch of the Legislature may be expelled for cause by a vote of such branch.

It is significant that none of the provisions for removal of an officer of a town gives authority to the town, or to the voters in their corporate capacity, to deprive him of his office. There are good reasons why such authority should not be vested in the inhabitants as a body. It is plain that public officers generally should not be subject to removal except for a good cause. If misconduct is alleged as a cause, there should be a trial to determine whether the accused is guilty. The inhabitants of a town assembled in a town meeting cannot properly conduct such a trial. If they attempt to do it by a committee, there is great risk that the members of the committee will not be well fitted for the performance of judicial duties. Moreover, there is no provision of law whereby such a committee can compel the attendance of witnesses and the giving of testimony. The committees appointed in this case were able to obtain only such testimony as was voluntarily given. It is not strange that, in providing for the removal of certain town officers, the Legislature has always prescribed methods other than by a vote of the inhabitants of the town.

It has been held in a great many cases that public officers, even when elected by the voters of a town to perform statutory duties which involve the expenditure of money properly raised by local taxation, are not the agents of the town. They represent the public, and are subject to control by the Legislature, or by such agencies as the Legislature provides for the purpose. Their term of office is prescribed by the Legislature, and they can be removed only in accordance with the legislative will.

Ample provision is made for the filling of vacancies in town

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offices. R. L. c. 11, §§ 355 to 361. If a person removes from a town, he thereby vacates any town office held by him. R. L. c. 11, § 362.

Thus it is seen that the election of public officers, their removal from office, and the filling of vacancies have been the subjects of elaborate legislation. There is no provision for the removal of members of the board of health in towns. In the absence of any such provision we are of opinion that they cannot be removed by a vote of the town, either with or without a hearing before the town or a committee thereof.

Information dismissed.

F. L. Simpson, (*W. H. Niles* with him,) for the relators.

J. H. Sisk, (*R. L. Sisk* with him,) for the respondents.

LEON LANGDEAU *vs.* JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

Hampden. September 25, 1906. — February 25, 1907.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Insurance, Life. *Evidence.*

In an action on a policy of life insurance, where the defence was that certain representations made by the insured in his application for insurance were false and either were made fraudulently or were material to the risk and avoided the policy, the policy stated that it was issued "in consideration of the statements and agreements in the application herefor, which are hereby referred to, and as warranties made a part of this contract, and of the premium" named. The presiding judge under R. L. c. 118, § 73, admitted in evidence an application for insurance by the insured, containing the representations in question, of which a copy was attached to the policy, although a so called proposal for insurance upon the other side of the same paper was not included in the copy attached to the policy and was excluded by the judge. The portion of the contents of the paper of which the copy was annexed included the questions and answers attested by the medical examiner and the statement signed by the applicant that these questions and answers should form the basis and become a part of the contract of insurance, and all the material portions under the designation "proposal for insurance" on the other side of the paper were incorporated by repetition in the part called the "application," of which the copy was annexed,

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except that the name of the beneficiary, a brother of the insured, appeared only in the "proposal for insurance." The terms of the policy and of the application gave the insured the right to change the beneficiary from time to time by a notice in writing subject to the approval of the company. *Held*, that, as the omission of the name of the beneficiary in no way affected the right of the company to avoid the contract, the ruling of the judge admitting the application in evidence as part of the contract was correct.

In an action on a policy of life insurance by an assignee from the beneficiary named in the policy, if the contract of insurance was obtained by misrepresentations of the insured made with actual intent to deceive or if a matter misrepresented by him increased the risk, the plaintiff under R. L. c. 118, § 21, cannot recover on the policy.

In an action on a policy of life insurance dated in December, 1904, where it appeared that in the application of which a copy was attached to the policy the insured had answered in the negative the questions whether he used ardent spirits, wine or malt liquors, and whether he ever had used them to excess, the defendant, without objection from the plaintiff, introduced in evidence a record of a court in a city in another State showing that in 1898 the insured had pleaded guilty to a charge of drunkenness, had been found guilty and had paid the fine imposed, followed by testimony of numerous witnesses tending to prove habits of intoxication on the part of the insured and his use of intoxicating liquor to excess. Against the exception of the plaintiff the presiding judge admitted in evidence the record of the conviction of the insured in the police court of Chicopee in September, 1903, showing that he pleaded guilty to the crime of drunkenness and was fined $5, which he paid, and also admitted, subject to the plaintiff's exception, in answer to a question in regard to the use of intoxicating liquors by the assured the answer "He was a man, at that time, who was frequently under the influence of liquor on the street, especially Saturday afternoons and through Sundays. That would be his time of leisure." *Held*, that the evidence was admitted properly upon the issues of the falsity of the representations made by the insured and his knowledge that they were false.

In an action on a policy of life insurance where it appeared that in the application of which a copy was attached to the policy the insured represented that he never had been rejected for life insurance by the defendant or any other company, there was uncontroverted evidence that less than a month before his application to the defendant the insured had applied to another company for insurance and had been rejected, but there was no direct evidence that he had been informed of the rejection. *Held*, that it was a question for the jury whether under the circumstances disclosed by the evidence the insured should have drawn the inference that his proposal had been rejected.

In an action on a policy of life insurance it appeared that in the application of which a copy was attached to the policy the insured represented that he never had been rejected for life insurance by the defendant or any other company. The question in the application read, "Have you ever been rejected or postponed by this or any other company or society?" The plaintiff asked for an instruction that this question "should be construed as referring to rejection or postponement for insurance of the same class and kind as that applied for in said application." The presiding judge refused to give this instruction. *Held*, that the refusal was right, as the inquiry was not limited to any particular kind of contract, but was intended to elicit information upon the question whether insurance in any form had been refused upon the application of the insured.

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CONTRACT upon two policies of insurance for $250 each issued upon the same application on the life of Arthur Paquette and made payable to one Romeo Paquette, which after the death of the insured were assigned to the plaintiff, Leon Langdeau. Writ dated June 19, 1905.

In the Superior Court the case was tried before *Crosby*, J. At the trial, the plaintiff put in evidence the policies of insurance, the proof of the death of the insured, proof of payment of all premiums due up to the date of the death of the insured, proof that Romeo Paquette was the beneficiary under the terms of the policies and that Romeo Paquette made an assignment of his right, title and interest under the policies to the plaintiff, after the death of the insured. This evidence was not controverted by the defendant.

The policies in question were issued upon the basis of certain statements and representations made by the insured in his application in answer to questions asked therein. Among others, there were the following questions and answers: "No. 12. Q. Do you use ardent spirits, wine or malt liquors? If so, average quantity each day? A. No." — "No. 13. Q. Have you ever used them to excess? A. No."

The plaintiff requested the defendant to produce the original application upon which the policies were issued on the life of Arthur Paquette and also the paper or writing in which the name of the person named as beneficiary under the above mentioned policies was set forth. In response to this request the defendant produced in court at the trial a paper which was marked Exhibit J, and was put in evidence by the plaintiff. It was admitted that this paper was signed by the insured on both sides. It did not appear from the evidence that the insured signed and delivered any other paper before the policy in question was delivered. The paper marked Exhibit J was dated December 4, 1904. The policies were dated December 14, 1904.

The policy contained the following provisions:

"In consideration of the statements and agreements in the application herefor, which are hereby referred to, and as warranties made a part of this contract, and of the premium of 19 cents to be paid at or before noon on Wednesday of each week

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during the lifetime of Arthur Paquette the insured hereunder, agrees to pay the sum of Two Hundred and Fifty Dollars, subject to the following conditions and provisions and those recited on the back hereof, which are made a part of this contract.

"In the event of the decease of the insured while this Policy is in force, payment of the amount due hereunder will be made within twenty-four hours after satisfactory proof of death, to the beneficiary, if living, last nominated, whether in the proposal herefor or in any written amendment thereof filed with and approved by the Company; but the Company may make payment to the Executor or Administrator of said insured, or to any relative by blood or connection by marriage, or to any other person in the judgment of said Company equitably entitled to the same by reason of having incurred expense in any way on behalf of the insured for burial, or for any other purpose; and the receipt of any such person shall be conclusive evidence that payment has been properly made, and shall discharge the Company from liability under this Policy."

The copy of the application for insurance, which was the portion of Exhibit J printed on the back of the policy, after stating the questions and answers, terminated as follows:

"I declare and warrant that the representations and answers made herein are complete, strictly correct and true; that the several questions were duly asked and that the answers given by me are truly recorded as above; that they shall form the basis and become part of the contract of insurance; that any false or untrue answer shall render the Policy null and void; and that said Policy shall not be binding upon the Company unless at noon upon its date I shall be alive and in good and sound health; hereby accepting, for any person who shall have interest in said Policy, the Company's determination and apportionment of dividends and method of distribution thereof. The right is reserved to the insured to change the beneficiary from time to time by written notice to and subject to the approval of the Company, but payment upon presentation of the Policy and the Premium Receipt Book shall be in full satisfaction of claim.

"Arthur Paquette, Applicant."

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"I hereby certify that the foregoing questions were asked by me and the answers given as recorded, and that I witnessed the applicant's signature, on Dec. 4, 1904.

"J. G. Beauchamp, M. D."

The defendant offered evidence to show that the answers of the insured to Questions Nos. 12 and 13, in that portion of Exhibit J which followed "Application for Insurance in the John Hancock Mutual Life Insurance Company," were false and made with actual intent to deceive the defendant, or that the matters misrepresented increased the risk of loss. The following question was asked on cross-examination of one of the plaintiff's witnesses: "Q. He was the same Arthur Paquette who was arrested and fined for drunkenness in the Chicopee Police Court, wasn't he?" The plaintiff objected to the evidence on the ground that the defendant had not complied with R. L. c. 118, § 73, in that it had failed to attach a correct copy of the application to the policies issued to the insured. The plaintiff asked the judge to rule that the whole of Exhibit J constituted the application for the policies. The judge refused so to rule, and ruled that the portion of Exhibit J which constituted the application was that portion thereof contained on its second page which followed the words: "Application for Insurance in the John Hancock Mutual Life Insurance Company" down to and including the words "Arthur Paquette, Applicant." It was not disputed that a correct copy of the portion of Exhibit J admitted by the judge was attached to each of the policies in suit. To this ruling and refusal to rule the plaintiff excepted. The judge further stated "That question may be answered for the purpose only of identifying this insured as the same person whose name appears in some record, with the understanding that the record shall be produced." Then ensued the following: "Q. Will you answer that question? A. I would not say he was drunk. — Q. I didn't ask you that. A. I know he got arrested. I could not tell what he was arrested for."

The defendant subsequently introduced as a witness the clerk of the Police Court of Chicopee and offered in evidence a record of the conviction of Arthur Paquette before the Police Court of Chicopee on September 5, 1903, showing that he pleaded guilty to the crime of drunkenness and was fined $5, which he paid.

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This record was admitted by the judge against the exception of the plaintiff.

The defendant introduced as a witness one Mathews, who was asked: "Will you state what you know about Mr. Paquette's habits with reference to the use of intoxicating liquors?" He answered, subject to the plaintiff's exception, "He was a man, at that time, who was frequently under the influence of liquor on the street, especially Saturday afternoons and through Sundays. That would be his time of leisure."

A record of the city court of Norwich, Connecticut, was introduced by the defendant, without objection by the plaintiff, to the effect that Arthur Paquette was presented before that court on August 12, 1898, complained of for intoxication, pleaded guilty, was found guilty and was ordered to pay a fine of $3 and costs, which he paid. This was followed by the evidence of numerous witnesses introduced by the defendant, without objection by the plaintiff, whose testimony tended to prove habits of intoxication on the part of the insured, and who testified to various instances of his use of intoxicating liquor to excess.

The defendant offered in evidence a deposition of one Littlejohn to prove that the insured had been rejected by another insurance company previous to his application for insurance in the defendant company, in contravention of his stipulation or representation as contained in the question numbered 17 of the alleged copy of the application attached to the policies. The plaintiff objected upon the ground above set forth that a correct copy of the application was not attached to the policies. The judge admitted the evidence and the plaintiff excepted. The evidence did not show that the insured had any written or oral notice of such rejection.

The evidence offered in this deposition was substantially as follows: That Edward Littlejohn was an officer in the employ of the Prudential Insurance Company of America on November 9, 1904; that his duties included the rejection of applications for insurance in that company; that on or before November 9, 1904, an application for additional insurance was made to that company by Arthur Paquette, who at that time was the insured named in two policies previously issued by that company; that this application came before Littlejohn for his rejection or ap-

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proval; that he was the officer properly authorized to make such rejection and his decision was final. He then was asked by Interrogatory 17, "If so, what action on it did you take and when did you take that action?" Answer to Interrogatory 17, "I declined his said application on the 9th day of November, 1904."

The insurance issued on the life of Arthur Paquette by the defendant company was special weekly premium insurance of the class known as industrial insurance.

The plaintiff asked the judge to make, among others, the following rulings:

Number 7. The defendant must prove that the insured had knowledge of his rejection for insurance on his life at the time of making the statements contained in the application for insurance in the John Hancock Mutual Life Insurance Company.

Number 8. The question in the application for insurance in the John Hancock Mutual Life Insurance Company, "Have you ever been rejected or postponed by this or any other company or society?" should be construed as referring to rejection or postponement for insurance of the same class and kind as that applied for in said application.

The judge refused to make these rulings and the plaintiff excepted.

The judge made the following ruling at the request of the defendant:

"Number 14. The insured represented in his application to the defendant that he had never been rejected or postponed by that or any other company. The evidence that he had been rejected by the Prudential Company is not controverted by the plaintiff. If you find that this false representation or statement was made with actual intent to deceive the defendant the policies issued on his life were thereby rendered void and the defendant is entitled to a verdict in its favor." To this ruling the plaintiff excepted.

The judge instructed the jury upon the subject as follows:

"Now, gentlemen, there is another question which comes up in this case with reference to the Hancock Company, and that is that these policies are void, by reason of the statement made by this deceased that he had not been rejected for insurance by any

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other company, and the question was, 'Have you ever been rejected or passed upon by this or any other company, etc.,' and the answer was 'No.' The evidence shows that he did make a second application in the Prudential Insurance Company on November 9th, 1904, and that that application was rejected. There is not any evidence in this case that I now recall, any direct evidence in the case, that he knew the application was rejected, but it is for you to say, gentlemen, whether or not he did know or whether he had a right to believe and whether it was his duty to believe that in view of all the circumstances he had been rejected, but in considering that question you will determine the date, the time when he made his application for insurance in the Prudential Company, the second application, which was rejected. That application was made on the 9th of November, and the application in the Hancock Company was made on the 4th day of December, a period of about three or four weeks, and I instruct you with reference to that that if he made that answer which he did make with the actual intent to deceive the John Hancock Insurance Company, or if the making of the answer which he did make, the false answer, actually did increase the risk of loss, then the plaintiff is not entitled to recover against the Hancock Insurance Company. The question is, when this answer was made had this deceased such opportunity for knowing that he ought to have understood that he had made an application and that it was rejected or that he believed it to be rejected. The statement which was made was a false statement. There is no doubt about that, because the undisputed evidence shows that before this application was made that application had been actually rejected. Now, was his statement made with the actual intent to deceive the Hancock Insurance Company, or, if it was not made to deceive the Hancock Insurance Company, did it, as a matter of fact, actually increase the risk of loss? If that is so, then the plaintiff is not entitled to recover against the Hancock Company, and, gentlemen, as bearing upon that, you take all the evidence and all the facts and circumstances in the case and weigh them carefully and determine whether or not either one of those things occurred. If they did, the plaintiff is not entitled to recover. If they did not occur, if it did not increase the risk of loss and was not made with intent

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to deceive, then that would eliminate one of the grounds of defence in this case."

In answer to a question specially submitted to them by the judge, the jury found that at the date when the insured made the application to the defendant for insurance he was not addicted to the excessive use of intoxicating liquor, but that before that date he had used ardent spirits, wine or malt liquors to excess. The jury returned a general verdict for the defendant; and the plaintiff alleged exceptions.

The case was argued at the bar in September, 1906, before *Knowlton*, C. J., *Morton*, *Hammond*, & *Braley*, JJ., and afterwards was submitted on briefs to all the justices except *Rugg*, J.

J. F. Malley, for the plaintiff.

E. W. Beattie, Jr., (*D. E. Leary* with him,) for the defendant.

BRALEY, J. The answer among other defences specifically alleged that under the application the representations of the insured that he never used intoxicating liquors, or, if so, that he never had used them to excess, and that he had not been rejected or "postponed" by any other insurance company, or society, were false, and being either fraudulently made, or material to the risk, avoided the policy. R. L. c. 173, § 27. *Kidder* v. *Order of the Golden Cross*, 192 Mass. 326. The admissibility of these representations depends upon the correctness of the ruling, that the proposal for insurance formed no part of the application, a copy of which under R. L. c. 118, § 73, unless attached to the policy cannot be considered as forming a part of the policy or introduced in evidence. *Considine* v. *Metropolitan Ins. Co.* 165 Mass. 462. *Johnson* v. *Mutual Ins. Co. of New York*, 180 Mass. 407, 408. This requirement was not a rule either of construction or of evidence at common law, but "the object of the statute is to prevent companies from holding insured persons bound by a contract in writing of which they have no copy." *Holden* v. *Prudential Ins. Co.* 191 Mass. 153, 157. In the policy furnished, which purported to have attached a correct copy of the application, the proposal was wholly omitted, and only the questions and answers attested by the medical examiner, and the statement signed by the applicant that these questions and answers should form the basis and become a part of the contract of insurance were annexed. While an oral contract for insurance is valid, it is uni-

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versally customary to embody the terms of the contract in the policy, which usually does not recite the conditions upon which it is issued, but incorporates them by a general reference to a separate paper, usually termed either the declarations or proposal or application of the party desiring insurance. *Holmes* v. *Charlestown Mutual Ins. Co.* 10 Met. 211, 214. When completed such negotiations are supposed to include all the essential terms of the proposed contract, of which they form a part, *Scammell* v. *China Mutual Ins. Co.* 164 Mass. 341, 342, and, although the general designation by which they are incorporated may vary according to the practice adopted by different companies, yet to ascertain the material provisions of the contract the inquiry is the same, namely: What did the insured offer to which reference is made, and how far has this offer been accepted by the company? *Daniels* v. *Hudson River Ins. Co.* 12 Cush. 423. *Miles* v. *Connecticut Mutual Ins. Co.* 3 Gray, 580. *Harris* v. *North American Ins. Co.* 190 Mass. 361.

Omitting all reference to memoranda which neither party contends to be material, these preliminary negotiations are found on the first and second pages of a paper referred to in the exceptions as exhibit "J." The first page purports to be a proposal for insurance "on the whole life plan" at a special weekly premium, signed by the insured, who is referred to under his signature as "the person to be insured," while the second page, signed by him as the "Applicant" is designated as an "Application for Insurance." In the policy this language is found: "in consideration of the statements, and the application herefor which are hereby referred to, and as warranties made a part of this contract, and of the premium . . . to be paid" upon the death of the insured if the policy is in force the company agrees to pay the amount of insurance to the beneficiary, if living, last nominated "whether in the proposal herefor, or in any written amendment thereto filed with, or approved by the company." It is manifest from a comparison of the contents of this paper, exclusive of the medical examination, that all the material portions designated as the proposal were by repetition incorporated in the part called the "application" which was made the basis of the contract, even if the name of the beneficiary appeared only in the proposal. When the insured received the policy

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with a copy of this application annexed he was put in possession of the entire contract with this exception, but as the exception in no wise affected any essential element of the contract upon which the right of the company to avoid it depended, and of which the insured was entitled to a copy, the statute was satisfied, and the ruling admitting the application in evidence as a part of the contract was correct.

Until the death of the insured his designation of a beneficiary, being subject to change with the consent of the insurer, was ambulatory and constituted a mere expectancy, but, there having been no appointment subsequent to the proposal, upon the happening of this event the interest of the plaintiff's assignor, who had been designated, became vested, and by assignment passed to the plaintiff. *Tepper* v. *Royal Arcanum*, 14 Dick. 321. *Spengler* v. *Spengler*, 20 Dick. 176. *Hopkins* v. *Hopkins*, 92 Ky. 324. *Union Mutual Association* v. *Montgomery*, 70 Mich. 587. *Life Association* v. *Winn*, 96 Tenn. 224. *Martin* v. *Stubbings*, 126 Ill. 387. Compare *Rawson* v. *Milwaukee Mutual Ins. Co.* 115 Wis. 641, 647. See also *Pingrey* v. *National Ins. Co.* 144 Mass. 374, 382; *Central Bank of Washington* v. *Hume*, 128 U. S. 195.

By reason of privity of title, if the insurance had been payable to the insured, upon suit by his administrator or executor the record evidence of his plea of guilty to the charge of drunkenness, made before the application was presented to the company, would have been competent. *Noyes* v. *Morrill*, 108 Mass. 396. *Stockwell* v. *Blamey*, 129 Mass. 312. *Fellows* v. *Smith*, 130 Mass. 378. But, while the plaintiff claims under the beneficiary, his right to recover like that of his assignor is derived from the insured, and rests upon the validity of the contract. R. L. c. 173, § 4. *Andrews* v. *Tuttle-Smith Co.* 191 Mass. 461. *Life Association* v. *Winn*, *ubi supra*. *Smith* v. *National Benefit Society*, 123 N. Y. 85. *Van Frank* v. *United States Masonic Benevolent Association*, 158 Ill. 560. *Connecticut Ins. Co.* v. *Hillmon*, 188 U. S. 208. This contract was voidable by the company if fraudulently obtained either by misrepresentations made with actual intent to deceive, or if the matter misrepresented increased the risk. R. L. c. 118, § 21. *Ring* v. *Phœnix Assurance Co.* 145 Mass. 426. *Durkee* v. *India Mutual Ins. Co.* 159 Mass. 514.

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If the insured used ardent spirits to excess his habits of inebriety were material upon whether he was an insurable risk. *Rainger* v. *Boston Mutual Life Association*, 167 Mass. 109. In support of its contention that the negative answers to the questions concerning this habit were false, without objection the defendant introduced the evidence of many witnesses, and a previous plea of guilty to a similar charge, which tended to prove that for a long time previous to the application the insured was addicted to habits of intoxication. It further appears that, as the evidence to which the exception was taken was within this period, it is not open to the objection of being so remote as to have no evidentiary value. The issue was the falsity of the representations, and this fact could be established only upon proof of habits of drunkenness shown by his conduct, of which he must be presumed to have had knowledge and to which if living he could have testified. *Dolan* v. *Mutual Reserve Fund Association*, 173 Mass. 197, 201. *O'Connell* v. *Cox*, 179 Mass. 250, 254. *Swift* v. *Massachusetts Mutual Ins. Co.* 63 N. Y. 186, 191. *Smith* v. *National Benefit Society*, *ubi supra*. *Welch* v. *Union Central Ins. Co.* 108 Iowa, 224. *Sutcliffe* v. *Iowa State Traveling Men's Association*, 119 Iowa, 220. *Life Association* v. *Winn*, *ubi supra*. *Connecticut Ins. Co.* v. *Hillmon*, *ubi supra*. *Kelsey* v. *Universal Ins. Co.* 35 Conn. 225. *Asbury Ins. Co.* v. *Warren*, 66 Maine, 523. R. L. c. 175, § 66.

If the unqualified answer to the seventeenth question as to previous insurance was untrue, and made with actual intent to deceive, the misrepresentation avoided the policy, and this question ordinarily is one of fact for the jury to determine under suitable instructions. *Coughlin* v. *Metropolitan Ins. Co.* 189 Mass. 538, 539, and cases cited. *Mutual Benefit Ins. Co.* v. *Wise*, 34 Md. 582. *Towne* v. *Towne*, 191 Ill. 478. While the evidence was uncontroverted that a short time before the policy in suit was issued the insured had made application to another company for insurance and had been rejected, there was no direct proof that he had been informed of the rejection, but, the representation being false, it was for the jury to say under all the circumstances disclosed by the evidence whether as a man of average capacity in the ordinary course of human affairs the insured should have understood that his proposal had been unfavorably

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acted on and should have drawn the inference that it had been rejected. *American Union Ins. Co.* v. *Judge*, 191 Penn. St. 484. In the instructions given, which adopted not only the fourteenth request of the defendant but the seventh request of the plaintiff, the jury were instructed correctly that unless they found constructive notice by which the insured was chargeable with such knowledge, this ground of defence could not prevail.

The plaintiff's eighth request was refused properly, as the inquiry was not limited to any particular kind of contract, but was intended to elicit information whether upon his application insurance in any form had been refused.

An exception to the further instruction that if the risk of loss was thereby increased the plaintiff could not recover, has not been argued, and must be treated as waived.

Exceptions overruled.

WILLIAM E. CRAFER *vs.* AINSLEY R. HOOPER.

Suffolk. November 12, 1906. — February 25, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Libel and Slander. Practice, Civil, Exceptions.

In an action for oral slander in charging the plaintiff with a crime the plaintiff may recover without showing special damage.

Where the circumstances are such as to make an oral charge of larceny a privileged communication if made in good faith and in a proper manner, although the communication does not become actionable merely because the speaker's language is intemperate and excessive from excitement, yet intemperance and excess of language beyond such as naturally would be aroused by the circumstances are evidence of express malice, which would make the communication actionable.

In an action for oral slander in charging the plaintiff with larceny, where the defence set up is that the charge was a privileged communication made in good faith, the defendant upon the argument of exceptions after a verdict for the plaintiff cannot raise the point that the definition of express malice given by the presiding judge was wrong if none of the rulings asked for by the defendant contained a definition of express malice and he took no exception to this part of the judge's charge.

In an action for oral slander in charging the plaintiff with larceny, where the defence set up is that the charge was a privileged communication made in good

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faith after the defendant had been informed that a pocket book in his house had been stolen, and there is evidence that the plaintiff was searched at the suggestion of the defendant, an instruction of the presiding judge is correct to the effect that if the defendant made the accusations of theft to humiliate the plaintiff and not for the purpose of recovering the missing money it would destroy the defence of privilege, and that in passing on that question the jury could consider the search made, and, if they found that it was made against the will of the plaintiff under threats of prosecution, they could consider that fact in determining whether the real motive of the defendant in making the accusations was to humiliate the plaintiff.

TORT for alleged oral slander in charging the plaintiff with the crime of larceny by words substantially as follows: "I want this man (meaning the plaintiff) searched. There is a wallet missing, and he has stolen it. My son tells me he (meaning the plaintiff) makes a business of going around stealing carpenters' tools and selling them to get money for rum." Writ in the Municipal Court of the City of Boston dated August 14, 1903.

The answer contained a general denial; and further alleged that at the times when the words mentioned in the plaintiff's declaration were alleged to have been spoken a pocket book had been lost in the defendant's house and the defendant was endeavoring to find such lost pocket book and its contents, and that, if the defendant spoke the words alleged in the plaintiff's declaration, he spoke them in good faith, without malice, in the performance of a duty and with the honest and reasonable purpose of protecting his interests, and that such words, if spoken, were privileged by reason of the occasion on which they were spoken.

On appeal to the Superior Court the case was tried before *Aiken*, C. J. It appeared that the plaintiff was a journeyman carpenter and was working one day for three or four hours on a job in the defendant's residence; that during this time the defendant's wife reported to the plaintiff and to the defendant that a pocket book had been lost from the house; that, when the plaintiff left the house after finishing his work, he went to another building nearby, where his employer and some other carpenters were at work; that the defendant and his son followed the plaintiff, and that the defendant then told the plaintiff's employer of the supposed loss of the pocket book; that the plaintiff then was searched by his employer and another man; and that, subsequently, the pocket book was discovered in the

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defendant's house. There was evidence introduced on behalf of the plaintiff tending to show that the defendant spoke substantially the words complained of; that the defendant directed the searching of the plaintiff; and that the defendant said he would have the plaintiff arrested if he refused to be searched. There also was evidence introduced on behalf of the defendant tending to show that the defendant believed that the pocket book was lost; that all he did and said was for the purpose of finding the pocket book, if possible; that he believed he had good grounds for suspicion against the plaintiff; and that he had no feeling of malice or resentment against the plaintiff, nor any purpose of making any statement that was not in exact accordance with the facts.

At the close of the evidence the defendant asked the judge to rule that on all the evidence the plaintiff could not recover and to order a verdict for the defendant. The judge refused to do this, and the defendant excepted. The defendant further requested the judge to rule and instruct the jury as follows:

"1. In general an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well known limits as to verbal slander) and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence, depending on the absence of actual malice. If fairly warranted by any reasonable occasion, or exigency, and honestly made, such communications are protected for the common convenience and welfare of society, and the law has not restricted the right to make them within any narrow limits.

"Applying these principles to the facts of the present case, and it will stand thus: If the plaintiff can show that the publication was false in any material respect, and can also show special damage, done to himself, by means of it, that will make a *prima facie* case for the plaintiff, and as standing thus, malice would be presumed. But if the defendant can show that the publication was honestly made by him, believing it to be true,

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and that there was a reasonable occasion or exigency in the conduct of his own affairs, in matters where his interest was concerned, which fairly warranted the publication, such proof would rebut the presumption of malice, and bring the publication within the class of privileged publications, and form a good defence to the action, unless the plaintiff can show express malice, or malice in fact, which of course will be a question for the jury.

"2. If one who has lost goods by theft goes to the house of the person whom he suspects to have stolen them, and there, in reply to questions put as to the object of his visit, accuses that person of the theft and states the grounds of his accusation, the communication is privileged, if made in good faith, with the belief that it is true, and without express malice, although made in the presence of others, and although it may have been intemperate and excessive from excitement.

"3. If an employer, on an occasion which renders the words privileged, accuses his employee, in the presence of a third person, of stealing money from him, the fact that the employer does not have a full belief that the employee is guilty does not render the words the less privileged, if he honestly suspects him of committing the crime."

The judge refused to give the rulings requested except so far as they were embodied in his charge to the jury.

At the close of the charge the defendant also excepted specifically to that part of the charge in which the judge instructed the jury as follows: "The circumstances if as I have just stated them, are protected by the law, although the words may have been intemperate and excessive from excitement, provided the excitement was such as would naturally be aroused by the circumstances."

The defendant also excepted specifically to that part of the charge which was as follows: "There was no right to search the plaintiff Crafer against his will and if he submitted under the suggestion that there would be a prosecution if he did not, and that suggestion came from the defendant Hooper, you would be justified in inferring that there was malice."

The defendant also specifically excepted to the refusal of the judge to give his second request, especially to the refusal to give

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the substance of such request as to the communication being privileged although it may have been intemperate and excessive from excitement, without adding the qualification contained in the charge, "provided the excitement was such as would naturally be aroused by the circumstances."

The jury returned a verdict for the plaintiff in the sum of $250; and the defendant alleged exceptions.

H. S. Dewey, for the defendant.

J. E. Young, (*W. J. Gaffney* with him,) for the plaintiff.

LORING, J. 1. The second paragraph of the first ruling asked for evidently was copied from the opinion in *Swan* v. *Tappan*, 5 Cush. 104, 111. The defendant's counsel overlooked the fact that that was a case where special damage had to be shown. In the case at bar the slander consisted in charging the plaintiff with a crime. In such a case special damage does not have to be shown to make out a case. For this reason the exception to the refusal to give this ruling must be overruled.

2. The second ruling asked for is in these words: "If one who has lost goods by theft goes to the house of the person whom he suspects to have stolen them, and there, in reply to questions put as to the object of his visit, accuses that person of the theft and states the grounds of his accusation, the communication is privileged, if made in good faith, with the belief that it is true, and without express malice, although made in the presence of others, and although it may have been intemperate and excessive from excitement."

The presiding judge gave this ruling, adding at the end of it: "provided the excitement was such as would naturally be aroused by the circumstances."

If the jury found as a fact that there was intemperance and excess in the defendant's communication beyond such as naturally would be aroused by the circumstances, that was a fact which they were bound to consider in connection with the defence of privilege and the express malice which destroys that defence. If they believed that this excess did not in fact come from the heat and excitement of the situation, that fact would at least be evidence of express malice, the proving of which destroys the defence of privilege. *Fryer* v. *Kinnersley*, 15 C. B. (N. S.) 422. *Atwill* v. *Mackintosh*, 120 Mass. 177.

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3. The defendant's next contention is that the definition of express malice given by the presiding judge was wrong.* It seems to be in accordance with the English law on the subject. See Lord Blackburn in *Capital & Counties Bank* v. *Henty*, 7 App. Cas. 741, 787; Bramwell, L. J. in *Clark* v. *Molyneux*, 3 Q. B. D. 237, 245; Pollock, Torts, 260, 261; Odgers, Libel & Slander, (4th ed.) 320, 321. Whether it was or was not right under our decisions need not be decided. None of the rulings asked for by the defendant contained a definition of express malice, and no exception was taken to this part of the judge's charge.

4. The defendant excepted to that part of the charge in which the presiding judge said that "There was no right to search the plaintiff Crafer against his will and if he submitted under the suggestion that there would be a prosecution if he did not, and that suggestion came from the defendant Hooper, you would be justified in inferring that there was malice." Taken by itself this might be misunderstood. Taken in connection with what followed it, the charge is correct. The judge went on to say: "You will not infer malice in this aspect of which I am now speaking unless it is your conclusion that the search was in consequence of a purpose on Hooper's part to humiliate the plaintiff Crafer, and was submitted to because of apprehension of a prosecution." What the judge meant was that if the defendant made the accusations of theft to humiliate the plaintiff and not for the purpose of recovering the missing money, that would destroy the defence of privilege; that in passing on that fact they could consider the search made, and, if they found that it was made against the will of the plaintiff under threats of prosecution, they could consider that fact in determining whether the real motive of the defendant in making the accusations was to humiliate the plaintiff.

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* The instruction referred to contained the statement "Any indirect motive other than a sense of duty is what the law calls malice" and also contained the statement "If the defendant, that is Hooper, gave unnecessary publicity to his statements, by making them in the hearing of the plaintiff's fellow-workmen, you have a right to take that into consideration as evidence of malice."

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This was made still more clear by the last two paragraphs of the charge, where the presiding judge went over this ground again.

Exceptions overruled.

JULIA HOLIAN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 21, 1906. — February 25, 1907.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Negligence. Street Railway.

If a girl ten years and four months of age standing upon the curbstone of a sidewalk sees an electric car approaching when it is about eighty feet distant from her and, thinking that she has time to pass in front of it, starts to cross the street with the car in plain sight and with nothing to distract her attention, and, making no attempt to avoid the car either by quickening her pace or by waiting for it to pass, steps in front of the car and is knocked down and injured, she cannot recover for her injuries from the corporation operating the car, even if such operation is negligent, there being no evidence of such a degree of care on her part as reasonably can be expected from a child of her years.

TORT, by a girl ten years and four months old when injured, for personal injuries from being struck and knocked down by an electric car of the defendant while attempting to cross Cambridge Street at its junction with Columbia Street and Webster Avenue in Cambridge at five o'clock in the afternoon of May 2, 1900. Writ dated May 17, 1900.

At the trial in the Superior Court before *Fox*, J. the facts appeared which are stated in the opinion, and it also appeared that the plaintiff since she was three years old had lived in Cambridge on Columbia Street, a few doors from Cambridge Street, along which electric cars ran every few minutes, and since she was six years old had walked to school and back, two sessions daily, during the school months, from September to the middle of June in each year, and that she was of average intelligence, size and activity at the time of the accident.

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

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The case was submitted on briefs at the sitting of the court in November, 1906, and afterwards was submitted on briefs to all the justices.

T. W. Coakley, D. H. Coakley & R. H. Sherman, for the plaintiff.

F. Ranney & W. E. Monk, for the defendant.

SHELDON, J. This is a close case upon the question whether the plaintiff was in the exercise of that degree of care which could properly be expected of a child of her years; but we are of opinion that the verdict for the defendant was ordered rightly.

The evidence showed that the plaintiff, just before stepping off the curbstone into the roadway, looked up the track and saw the defendant's car approaching. It was then about eighty feet distant from her. She walked across the street so as to pass in front of the car, which was in plain sight all the time, with nothing whatever to prevent her from seeing it if she had looked at all. She simply walked across the street in face of the approaching car, without taking any precaution for her own safety, when she might have avoided the accident either by quickening her pace or by waiting for the car to pass. There was evidence of previous care on her part in looking for the car before she left the sidewalk; but we cannot find that she did anything at all for her own safety, or even had it in mind after she started to cross the street. She knew that the car was approaching; she had considered the question whether she would have time enough to get across, and acted upon her affirmative conclusion; then apparently she dismissed the subject entirely from her mind and left her safety wholly to chance or to the care of the defendant's motorman.

The case does not differ in principle from *Murphy* v. *Boston Elevated Railway*, 188 Mass. 8, or from *Stackpole* v. *Boston Elevated Railway*, 193 Mass. 562, in which the plaintiff, a boy of eleven years, passed behind a car on one track and was hit by a car on the other track which he testified that he had failed to see; and it was held that his own negligence prevented him from recovering. The cases relied on by the plaintiff's counsel, while recognizing the undoubted rule that a child is not to be held to the same degree of care that an adult ought to

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exercise, contain nothing at variance with the rule here stated. *McDermott* v. *Boston Elevated Railway*, 184 Mass. 126, simply holds that it is not necessarily negligent for a child six and a half years old to fail to look or listen for a car before following other children across an electric railway track. *Mattey* v. *Whittier Machine Co.* 140 Mass. 337, turned upon the fact that there was conflicting evidence as to the circumstances of the accident. In *O'Connor* v. *Boston & Lowell Railroad*, 135 Mass. 352, there was no indication of danger when the plaintiff started to cross the track, and he was held by his foot being caught between a rail and the planking. Other cases cited by the plaintiff depend upon the care of the parents or other persons in charge of a child of tender years, and are not applicable here.

The plaintiff seems to have stepped either heedlessly or recklessly in front of a car which, when she left the sidewalk, she knew was coming, which was all the time clearly within her sight with nothing to distract her attention. She neither paused nor hurried, nor did anything to avoid the accident. *Mullen* v. *Springfield Street Railway*, 164 Mass. 450. *Morey* v. *Gloucester Street Railway*, 171 Mass. 164. *Young* v. *Small*, 188 Mass. 4. There was no evidence that at the time of the accident she was exercising any care. *Mathes* v. *Lowell, Lawrence, & Haverhill Street Railway*, 177 Mass. 416.

It is unnecessary to consider the question of the defendant's negligence.

Exceptions overruled.

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GARRETT W. SCOLLARD *vs.* FRANCIS M. EDWARDS.

Suffolk. November 21, 1906. — February 25, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Tax, Collection. *Assignment*, For benefit of creditors. *Words*, "Assignee."

R. L. c. 13, § 33, in regard to the collection of taxes where the person assessed dies or becomes insolvent, which provides that "the executor, administrator or assignee" upon the receipt of any money applicable to the payment of the tax shall be liable for such tax after a demand, does not give a remedy against the assignee under a common law assignment for the benefit of creditors even if the assignor is in fact insolvent, the word "assignee" referring only to an assignee in insolvency under the statutes of the Commonwealth.

CONTRACT under R. L. c. 13, § 33, by the collector of taxes of the city of Boston for a tax amounting to $3,108 assessed upon A. B. Turner and Brother, who on March 3, 1903, being insolvent, assigned all their property and effects by an instrument in writing to the defendant who was alleged to have received sufficient money applicable to the payment of such tax to pay the same. Writ dated February 15, 1906.

In the Superior Court the case was submitted to *Hitchcock*, J. upon an agreed statement of facts. The judge found for the defendant, and ruled as matter of law that upon the agreed statement of facts the plaintiff was not entitled to recover. He ordered judgment for the defendant; and the plaintiff appealed.

G. A. Flynn, for the plaintiff.

B. E. Eames, for the defendant.

KNOWLTON, C. J. The R. L. c. 13, § 33, is as follows: "If a person assessed for a tax dies or becomes insolvent before the payment thereof, or if a tax is assessed upon the estate of a deceased person, the executor, administrator or assignee shall, if a demand has been made upon him therefor, forthwith upon receipt of any money applicable to the payment of the tax, pay the same, and in default shall be personally liable therefor as for his own tax." The present suit is an action at law founded on this statute. The plaintiff avers in the declaration that he is collector of taxes of the city of Boston, that a tax assessed

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against A. B. Turner and Brother was committed to him for collection, that a demand was made upon them for payment, that being insolvent they assigned to the defendant by an instrument in writing all their property for the benefit of their creditors, that the plaintiff demanded of the defendant payment of the tax, and that the defendant as assignee has received sufficient money applicable to the payment of the tax to pay the same, but has refused to pay it. As a conclusion from these facts the plaintiff says that the defendant now owes him the amount of the tax with interest thereon. Neither in the declaration nor in the argument has any claim been made except under the statute above quoted. Neither the city of Boston nor the plaintiff was a party to the assignment, and there is no averment on which an action at law can be maintained unless there is a liability by reason of this statute.

We are of opinion that the plaintiff has misconceived the purpose and meaning of the legislation. By the Rev. Sts. c. 8, § 15, after the death of a person who was taxed, the collector might maintain an action in his own name for the tax, in like manner as for his own debt. The St. 1848, c. 235, in terms extended this remedy so as to make it apply to a "tax lawfully assessed upon the personal estate of any deceased person." By the St. 1852, c. 234, it was provided that a tax assessed upon the personal estate of any deceased person, before the appointment of an administrator or executor, if otherwise legal, might be enforced in the same manner as if the executor or administrator had been appointed when the assessment was made. These acts were embodied in the Gen. Sts. c. 12, § 20, and in the Pub. Sts. c. 12, § 21, without material change. All this legislation was to provide a simple and easy way for the collection of a tax from the legal representatives of a deceased person, notwithstanding the complications that might arise from the laws relative to the settlement of the estates of such persons. When the statutes relating to the collection of taxes were codified in 1888, as appears in c. 390, § 25 of the statutes of that year, these provisions were extended so as to give the same rights against the assignee of an insolvent debtor as were given against the executor or administrator of a deceased person. This section applies only to a legal representative of a person who has deceased, or whose

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property, by reason of insolvency, has passed into the hands of an assignee under the provisions of the statutes. It has no application to persons who have received a conveyance for the benefit of creditors under an assignment at common law, even if the assignor is in fact insolvent. It prescribes duties for official representatives of insolvent and deceased persons in the settlement of estates, and creates liabilities against them if they fail to perform these duties in such a way as to relieve tax collectors from the necessity of waiting a long time for the settlement of an estate. In 1888, when assignees in insolvency were first included with administrators and executors, and made subject to the same duties and liabilities, there was no United States bankruptcy act in force, and it was desirable to give collectors this right against assignees in insolvency. The words, "the executor, administrator or assignee," refer to the particular recognized successor of a person who is no longer in charge of his estate. There might be several persons who received different assignments of property from an insolvent person, each of whom would be an assignee in the sense that he was one to whom an assignment was made; but this statute refers to *the* assignee, as it does to *the* administrator or executor. The rights of tax collectors against persons who receive assignments at common law from insolvent persons whose taxes are unpaid are sufficiently protected by the insolvency and bankruptcy acts, and otherwise. If it were the intention of the Legislature to give special rights against those who receive from an insolvent person an assignment of any property at common law, we should expect to find something plainly to indicate such a novel change in our system.

The plaintiff is not entitled to recover the tax under this declaration. Whether he could recover if the action were amended at law, or turned into a bill in equity, is not before us. Unless the plaintiff obtains leave from the Superior Court to make an amendment the entry must be,

Judgment affirmed.

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ANGELINE E. HYDE *vs.* BOSTON AND WORCESTER STREET RAILWAY COMPANY & others.

Worcester. October 3, 1906. — February 26, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Street Railway. Way. Eminent Domain. Boston and Worcester Street Railway Company. Statute. Constitutional Law.

The owner of land abutting on a public way, which is injured by reason of a change of grade of the way made in the construction of the railway of a street railway company in accordance with its grant of location from the selectmen of a town, has no remedy in tort against the street railway company or the contractor employed by it to do the work of construction. Whether, in case the abutting land is cut off by the change of grade from all proper access to the highway so as to be rendered incapable of reasonable improvement, the landowner may not be entitled to relief in a proper form of remedy seasonably sought, *quaere*.

Under St. 1901, c. 455, and the general law relating to street railways, the selectmen of a town on the line of the Boston and Worcester Street Railway Company had power to grant a location to that company authorizing it to cross with its railway a public way substantially at right angles and imposing a condition that the company should carry its tracks under the public way and for this purpose should raise the way not exceeding seven feet at the highest place.

The provisions of St. 1901, c. 455, and of the general law relating to street railways giving power to the selectmen of a town on the line of the Boston and Worcester Street Railway Company to grant a location to that company to cross with its railway a public highway substantially at right angles and to impose a condition that the company should carry its tracks under the highway and for this purpose should raise the highway not exceeding seven feet at the highest place, without providing that the railway company should make any compensation to the owners of abutting lands for injuries sustained by them from the construction of the railway in accordance with the grant of location, are constitutional, the original taking of land for the highway for the purposes of public travel, for which compensation is provided, having included the use of the highway for public travel by all reasonable devices.

TORT for trespass upon the plaintiff's premises. Writ dated January 28, 1904.

Originally the action was brought against the Boston and Worcester Street Railway Company alone. Later, upon motion of the plaintiff, James F. Shaw and Edward P. Shaw, doing business as James F. Shaw and Company, and Ransom Rowe and Bonfiglis Perini, doing business as Rowe and Perini, were joined as parties defendant.

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In the Superior Court the case was tried before *Gaskill*, J. The plaintiff was the owner of a farm situated upon both sides of Center Road, which is a public way in the town of Southborough. The Boston and Worcester Street Railway Company is a corporation authorized under general law and by St. 1901, c. 455, to construct and operate a street railway from Boston to Worcester. On August 19, 1902, a grant of location in accordance with R. L. c. 112 was made to the defendant company by the selectmen of Southborough which on March 26, 1903, was approved by the board of railroad commissioners.

This location authorized the defendant company to construct its tracks substantially at right angles across Center Road. Among the conditions imposed in the location upon the defendant company was one requiring it to construct its tracks beneath the surface of Center Road, and for this purpose to raise the highway at the point of crossing not more than seven feet, to carry the highway over the tracks by a bridge resting upon suitable masonry abutments and to provide for the approach of the highway to such bridge by suitable grading. All work in connection with these changes was to be done by the defendant company, and it was to indemnify the town of Southborough for all expense it might be occasioned, either by land damages or otherwise, from the performance of these requirements. Plans were prepared for this work in accordance with the location and were approved by the selectmen of Southborough. An inspector appointed by the selectmen watched the construction until it was completed to their satisfaction. No order was made by the selectmen or road commissioners as to changing the grade of the road other than the condition contained in the location. The construction of the street railway and the changes in the way in front of the plaintiff's premises all were done as required by the location. The work required by the location raised the grade of Center Road in front of the plaintiff's premises from nothing at one end to seven feet at the other, its highest point, and damaged certain fruit trees and changed the course of surface water to the harm of the plaintiff. No notice in writing stating the time, place and cause of the damage ever was given by the plaintiff to any of the defendants.

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It was agreed that the damage to the land of the plaintiff by the raising of the grade of Center Road under the order of location was $300, that the damage to the plaintiff's land by trespass of workmen of Rowe and Perini while working upon the construction of the street railway and on Center Road was $100, and that the damage to the plaintiff's land by the flow of surface water from the public way was $50.

Upon these facts the judge ruled that the defendant company and the defendants Shaw could not be held liable. He also ruled that the defendants Rowe and Perini could be held liable only for the trespass committed by their employees upon the plaintiff's premises.

With the consent of the parties the judge ordered the jury to find for the defendant company and for the defendants Shaw, and against the defendants Rowe and Perini for the sum of $100, and reported the case and his rulings to this court. If the rulings were right judgment was to be entered upon the verdict of $100 against Rowe and Perini and upon the verdicts in favor of the other defendants. If the rulings were not right in whole or in part the verdicts in whole or in part were to be set aside and judgment was to be entered as this court might direct.

F. W. Knowlton, for the plaintiff.

G. Murchie, for the defendants.

RUGG, J. This case must be decided in the light of several recent decisions respecting the liability of street railway companies and municipalities for the construction of street railways in accordance with locations duly granted. *Purinton* v. *Somerset*, 174 Mass. 556, was an action of tort against a town for damages sustained by the plaintiff by reason of the lowering of a public highway, upon which his land abutted, by a street railway company acting under the authority of a location granted by the selectmen. The defendant was held not liable. *Vigeant* v. *Marlborough*, 175 Mass. 459, and *Underwood* v. *Worcester*, 177 Mass. 173, were petitions under Pub. Sts. c. 52, §§ 15 and 16 (R. L. c. 51, §§ 15 and 16), for the assessment of damages occasioned, in the first case by the raising, and in the second by the lowering, of a street in front of the petitioner's premises by a street railway company acting in accordance with restrictions contained

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in locations. In both cases the petitioner was precluded from recovery on the general ground that the grant of location was made by public officers, who were not acting as agents of the municipality, and that the restrictions were reasonable. *Hewett* v. *Canton*, 182 Mass. 220, was an action of tort for damages caused by the overflow of water, growing out of obstructions in a gutter occasioned by the construction of a street railway under a legally granted location. In *Laroe* v. *Northampton Street Railway*, 189 Mass. 254, the plaintiff sought by an action of tort to recover damages for the building of an embankment upon the highway in front of his premises, and the turning of surface water upon his property by a street railway company acting under a lawful location. In the two latter cases, one being against the municipality and the other against the street railway, judgment was for the defendant, for the reason that the primary and direct purpose of these changes in the grade of the highway was the construction of the street railway. If the highway is improved or harmed for the purposes of the public travel by such changes, this result is subsidiary and incidental. It comes about through the action of public authorities over whom, in respect of their public duties, the municipality in its corporate capacity can exercise no control. *Flood* v. *Leahy*, 183 Mass. 232.

Since 1823 it has been the law of this Commonwealth that no action of tort can be maintained for the changing of the grade, or raising or lowering the surface, of a highway by one authorized by law to do so. *Callender* v. *Marsh*, 1 Pick. 418. This case has been many times cited with approval and the principle it illustrates has been often applied. Inasmuch as the changes of grade in highways occasioned by the lawful construction of street railways are not made by those charged with the duty of keeping highways in repair, the statutes passed with the apparent intention of remedying the injustice wrought by the highway statutes as revealed in the decision of *Callender* v. *Marsh*, *supra*, (Rev. Sts. c. 25, § 6, St. 1842, c. 86, § 2, R. L. c. 48, § 27, c. 51, §§ 15, 16,) afford no relief. At the time these statutes were enacted, the modern public service corporation, entering upon highways and altering their aspect in such material respects as the erection of poles and wires, the mutilation of shade trees, and the changing of the grade, under the authority

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of public officers and uncontrolled by the municipalities, had not come into existence. In the earlier statutes authorizing the transmission of intelligence by electricity, provision for damages to abutting landowners was made, and when, through a decision of this court, a defect in the relief thus afforded was pointed out, (*Pierce* v. *Drew*, 136 Mass. 75,) the evil was remedied by a new statute at the next session of the General Court. Additional enactments have been passed so that now the abutting landowner is afforded ample remedy for any damages he may sustain through constructions in the highway by telegraph, telephone, electric light, heating and power companies. St. 1849, c. 93, § 4. St. 1884, c. 306. St. 1895, c. 350. R. L. c. 122, §§ 3–5. An examination of the recent as well as earlier statutes governing the construction of street railways shows that the Legislature has not yet imposed a like liability upon street railways, notwithstanding the numerous recent decisions of this court, in which remediless injury to abutters has been pointed out. See in addition to cases above cited, *McDermott* v. *Warren, Brookfield, & Spencer Street Railway*, 172 Mass. 197; *Howe* v. *West End Street Railway*, 167 Mass. 46; *Williams* v. *Old Colony Street Railway*, 193 Mass. 305. St. 1894, c. 548, authorizing the construction of the Boston Elevated Railway, however, contained ample provision as to damages to abutters. *Baker* v. *Boston Elevated Railway*, 183 Mass. 178.

It only remains to inquire whether the condition in the location granted by the selectmen of Southborough to the defendant company, which required it to carry the highway over its tracks by a bridge, with the consequent change in grade, was legal. This location differs from that in the cases cited, in that it contemplates the crossing of the highway by the street railway at right angles, instead of a longitudinal construction within the way. The Legislature by St. 1901, c. 455, authorized the defendant company in effect so to construct its railway between Boston and Worcester, that its tracks might lie largely outside the limits of public ways. It is probable that this statute did not extend the rights possessed by street railway companies organized under the general law to construct their tracks upon private lands. Whether this statute was anything more than a declaration of the general power possessed by street railway companies or not, its effect was undoubtedly to remove whatever doubt

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had theretofore existed as to the right of local authorities to grant locations to this street railway company to cross public ways substantially at right angles. If, however, the sole right of the defendant company to accept the location with its conditions granted it in Southborough rested upon this special statute, a different conclusion perhaps might be reached as to the plaintiff's rights. We assume upon the authority of *Farnum* v. *Haverhill & Andover Street Railway*, 178 Mass. 300, that the selectmen of Southborough were authorized to grant the defendant company a location to cross Center Road substantially at right angles, apart from St. 1901, c. 455. A corollary of this proposition is that the defendant company was empowered to operate its street railway by the use of passenger cars, which in size and speed might rival those of steam railroads. The crossing of public ways at grade by cars of this character driven at high rates of speed inevitably adds to the danger of life and limb of travellers upon the street railway as well as upon the highway. It had become the settled policy of the Commonwealth long before the granting of the location in question to abolish crossings at grade of steam railroads and highways. St. 1890, c. 428. St. 1906, c. 463, Part I, §§ 29 to 45. By c. 440, St. 1902, (St. 1906, c. 463, Part I, §§ 29, 34, 35,) which was enacted previous to the work complained of by the present plaintiff, street railway companies having locations in highways affected by the abolitions of grade crossings of highways with steam railroads, were made proper parties to the proceedings for abolition, and might be compelled to pay a part of the expense. In view of this policy of the Commonwealth, in pursuance of which millions of dollars have been paid out of the public treasury already, the wisdom of the action of the selectmen of Southborough in requiring the defendant company to carry its tracks under the highway, and in not permitting a crossing at grade, cannot be questioned. The condition imposing upon the defendant company the obligation of raising the highway not exceeding seven feet at the highest place for this purpose was reasonable and legal and was for the purpose of promoting the security of those lawfully travelling upon the highway. In its last analysis it is simply an exercise of the easement of travel. See *White* v. *Blanchard Brothers Granite Co.* 178 Mass. 363.

Giving due weight to all these considerations, it must be held

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that the injury which the plaintiff has suffered falls within the decision of *Callender* v. *Marsh*, *ubi supra*, and the numerous other cases, which have been reviewed, respecting street railway constructions in highways, and no right of action exists for it. The Legislature by St. 1903, c. 476, § 2, (St. 1906, c. 463, Part III, § 47,) now has provided in a general law for the crossing, either over or under the public way, by street railway tracks, and the payment of damage by the street railway company to the abutting landowners. *Gardiner* v. *Boston & Worcester Railroad*, 9 Cush. 1. But this statute has no application to the case at bar.

The location granted by the selectmen of Southborough contained no provision that abutting landowners should be compensated by the street railway for injuries sustained by them. Therefore the validity of such a clause is not before us. R. L. c. 112, § 44, has no application to the case at bar. *Laroe* v. *Northampton Street Railway*, 189 Mass. 254, at p. 256.

The report does not disclose the length of highway wherein the grade was raised opposite land owned by the plaintiff. If the original way was substantially level, the distance must have been about one hundred fifty-six feet on each side of the bridge, for the grade of approach to the bridge was required by the location to be not over four and one half per centum, and the maximum elevation seven feet. The plaintiff's real estate was a farm and she had sold to the defendant company land adjacent to that part of the highway where the bridge was constructed. She formerly had a rough roadway from that point on Center Road to her back land. The change in grade cut off this roadway, but at the plaintiff's request a substitute roadway was built coming near her barn. So far as appears, this substitute roadway provided as easy access as the former one. It is not a necessary inference from these facts, taking into account the general character of the land affected as being a part of a larger farm, that there was occasioned by the conditions of the location an unreasonable interruption of the plaintiff's right of access to the highway in proper places. It still may be an open question whether upon sufficient proof that all proper access from abutting property to the highway is cut off by acts of the kind here complained of, so that, considering the nature of the real estate and the uses to which it is reasonably suited, it cannot be adapted to

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the improvement of which it is capable, a landowner may not seasonably secure relief in a proper form of remedy. *Eustis* v. *Milton Street Railway*, 183 Mass. 586. 2 Abbott, Mun. Corp. §§ 817, 818, 820, and cases cited. Lewis, Eminent Domain, § 91 e, f, g and h, and cases cited.

The plaintiff contends that a construction of the statute, which goes to the extent of authorizing the selectmen to permit a change of grade for the purposes revealed in this case without compensation, is unconstitutional. This argument proceeds upon a misconception as to the principles by which damages for the laying out of highways always have been determined in this Commonwealth. *Callender* v. *Marsh*, 1 Pick. 418, was a case of even greater apparent hardship to the plaintiff than the present, and the question of constitutionality, although duly raised, was decided adversely to the plaintiff. At page 432 Chief Justice Parker used this language: "When rightfully laid out, they [highways and public streets] are to be considered as purchased by the public of him who owned the soil, and by the purchase the right is acquired of doing everything with the soil over which the passage goes, which may render it safe and convenient; and he who sells may claim damages, not only on account of the value of the land taken, but for the diminution of the value of the adjoining lots, calculating upon the future probable reduction or elevation of a street or road. . . . And he who purchases lots so situated, for the purpose of building upon them, is bound to consider the contingencies which may belong to them." The rule of damages was again fully discussed and stated in the recent case of *Como* v. *Worcester*, 177 Mass. 543, where at p. 548 it was said by Knowlton, J.: "In estimating the damages for the taking of the land, the value of the easement which holds it for a public use for the purpose of a street forever is to be included. The city may use it as a street in any proper way, without making further compensation, except as statutes provide additional compensation for damages growing out of certain specified changes in the use. . . . The owner of the fee may use the street in any way which is not inconsistent with the paramount right of the public to use it, and this paramount right may include the laying of gas or water pipes, of sewers, of street railway tracks, the setting of posts for the support of electric wires, or any other use

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of a public nature which is incident to the location and maintenance of the street." See further, *Boston* v. *Richardson*, 13 Allen, 146, 159; *Cassidy* v. *Old Colony Railroad*, 141 Mass. 174, 177; *Lincoln* v. *Commonwealth*, 164 Mass. 1, 10. When the ascertainment of compensation to the owner for the appropriation of land for a public way, by the law of the land, always has been determined upon this justly liberal rule, it cannot be said that any provision of the Constitution has been violated by any reasonable use for highway purposes of land so appropriated, which the advance of civilization may render proper. Land so appropriated cannot be given over to other uses than those of public travel. But so long as the purpose is public travel by reasonable devices, the landowner has already received his "just" (U. S. Const. Amendm. art. 5) and "reasonable" (Declaration of Rights, art. 10) "compensation," save in those instances where a new recovery of damages occasioned by changes is permitted by statute. This has been the uniform current of adjudication by this court. *Attorney General* v. *Metropolitan Railroad*, 125 Mass. 515. *Pierce* v. *Drew*, 136 Mass. 75. *Howe* v. *West End Street Railway*, 167 Mass. 46. *White* v. *Blanchard Bros. Granite Co.* 178 Mass. 363. *New England Telephone & Telegraph Co.* v. *Boston Terminal Co.* 182 Mass. 397. *Eustis* v. *Milton Street Railway*, 183 Mass. 586. *Sears* v. *Crocker*, 184 Mass. 586.

We therefore are constrained to rule in favor of the defendant company, leaving the plaintiff to such relief as she may be able to secure elsewhere. That it might be proper for the Legislature, by some general law, to provide compensation at the cost of the street railway companies, whose acts occasion the injury, for losses of the kind complained of in this and the other recent cases of damage, which hereinbefore have been discussed, is not for us to deny, but without such legislative provision, the court can afford no relief.

The plaintiff waived her exceptions to the direction of the verdict in favor of the defendants Shaw, and the defendants have not contended that the direction of the verdict in favor of the plaintiff against the defendants Rowe and Perini was not correct. The judgments therefore are to be entered in accordance with the rulings of the Superior Court, and it is

So ordered.

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AMERICAN MALTING COMPANY *vs.* SOUTHER BREWING COMPANY.

Suffolk. November 12, 13, 1906. — February 26, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Findings of trial judge. *Bills and Notes. Payment. Evidence*, Presumptions and burden of proof. *Conflict of Laws. Fraud. Contract*, Rescission.

The findings of fact by a trial judge in a case heard by him without a jury if there is any evidence to support them must be treated as conclusive.

In this Commonwealth where a debtor delivers to his creditor a negotiable promissory note of himself or of another for the whole or a part of his indebtedness there is a presumption of fact that it was received in payment, which may be controlled by evidence that the creditor by accepting the note did not intend to extinguish the original debt.

If a promissory note for the price of goods is accepted by the seller in another State where the rule of evidence existing in this Commonwealth that the acceptance of a promissory note raises a presumption of fact that it was taken in payment does not prevail, but the goods are to be delivered in Boston and the note is made payable here, the rule of evidence above stated applies to the note, for the acceptance in the other State is of a contract to be performed here.

In an action against a corporation for the price of goods sold and delivered, where the only issue was whether the plaintiff had accepted from the defendant in part payment certain promissory notes of a partnership which had organized the defendant as their successor in business, it appeared that the plaintiff had been desirous of retaining the corporation as a customer and, when the giving of the notes was proposed regarded the financial condition of both the partnership and the corporation as unexceptionable, that when a large sum had become overdue and the plaintiff demanded payment, the defendant offered by letter the notes of the partnership "to settle everything due to the present moment, if acceptable," that the plaintiff replied by letter "that we would be pleased to receive notes from you, with interest, for the overdue amounts . . . and if you wish would be pleased to accept your notes for everything shipped you so far, having same run on stipulated time of contract," that the subsequent correspondence disclosed a similar course of dealing as to accruing indebtedness, and that in at least one instance the plaintiff returned an invoice receipted as paid and promised that other invoices should be receipted similarly. *Held*, that this evidence justified a finding by the trial judge, who heard the case without a jury, that the plaintiff agreed to accept the notes of the partnership in settlement of the open account payable when the letters were written and of any account that might become due for future deliveries of goods.

In an action against a corporation for the price of goods sold and delivered, where the only issue is whether the plaintiff accepted from the defendant in part payment certain promissory notes of a partnership which had organized the defendant as their successor in business, if it appears that in the correspondence which

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resulted in the taking of the notes by the plaintiff the treasurer of the defendant made material misstatements in regard to the cost of the defendant's plant and its having been paid for, but that, being also a member of the firm which signed the notes, he believed at the time that the firm was solvent, that there was no purpose to mislead the plaintiff and that the misrepresentations did not influence the plaintiff's conduct, the plaintiff has failed to show a right to rescind his acceptance of the notes on the ground of fraud.

CONTRACT by the American Malting Company, a corporation organized under the laws of the State of New Jersey and having its usual place of business in the city and State of New York, against the Souther Brewing Company, a corporation organized under the laws of the State of West Virginia and having its usual place of business in Boston, for the price of various cargoes of malt sold and delivered by the plaintiff to the defendant between October 28, 1898, and January 15, 1900. Writ dated January 26, 1900.

In the Superior Court the case was heard by *Fox*, J., without a jury, upon an auditor's report and additional testimony. The controversy in the case was under the defendant's plea of payment. There was due to the plaintiff on the date of the writ for malt sold and delivered $30,190.85, unless certain notes of J. K. Souther and Sons given by the defendant were to be allowed as payment *pro tanto*. If these notes were allowed as payment *pro tanto*, there was due to the plaintiff the sum of $17,710.65, with interest thereon from November 27, 1905.

The judge made the following findings:

"The finding of the auditor to the effect that there was an oral agreement between J. K. Souther and Charles M. Warner that notes should be taken in payment was controlled by the testimony before me, and I find that there was no such agreement affecting the questions here in issue. I find, however, that there was a written agreement that the notes of Souther and Sons should be accepted in payment *pro tanto* of the plaintiff's open account with the defendant, and that this written agreement is established by the letter of June 27, 1899, and the subsequent correspondence above set forth, read in the light of the situation of the parties as shown by the auditor's report.

"It appears that Souther and Sons had carried on a brewery business for many years and in 1898 incorporated the Souther Brewing Company, which took over their business. Warner

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one of the plaintiff's principal men and the head of the house which had been absorbed by the plaintiff corporation, had dealt with and given credit to Souther and Sons for years, and there is nothing essentially improbable in the fact that the plaintiff regarded the credit of Souther and Sons as good as that of the corporation which they had organized.

"I am of the opinion that the letter of June 27th is to be deemed a request, not for leave to give additional security but for leave to give substituted security; that the word 'settle' as used in this and later letters means 'pay,' and that the concurrence of the plaintiff in this construction is shown by the fact that in one instance it returned the invoice duly receipted as paid and in another instance promised so to receipt them.

"Respecting the plaintiff's contention that it has a right to rescind the agreement on the ground of fraud I find as follows: In the letter of June 27th there are some misstatements made by Souther with the knowledge of the facts. First, the new brewery did not cost more than $150,000; second, one bill for about $11,000 for construction had not been paid. When this letter was written Souther and Sons had given their note for this bill, but the corporation subsequently had to pay it. Third, the Souther Brewing Company was not taking all its malt from the plaintiff. Malt, although not to a very large amount, had been bought of other concerns.

"These representations might be deemed material if there were any evidence that the plaintiff paid any attention to them. The plaintiff furnished no direct evidence that it relied on these statements. It contended throughout that the notes were not accepted in payment, and in support of this contention introduced evidence that the question of accepting these notes was not made even a matter of discussion among its officers and agents. I cannot infer from the facts before me that the plaintiff relied on these misrepresentations in accepting the notes.

"It is further contended by the plaintiff that Souther committed a fraud in offering his own notes for the liability of the corporation, because of his insolvency at that time, even though he made no representations as to solvency. The auditor finds

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in substance that Souther was in fact insolvent, although he believed that he was solvent, and no evidence was offered before me which controls the auditor's finding on this point.

"All the facts material to the determination of the question whether the law of Massachusetts or the law of New York applies are stated by the auditor. Upon these facts I am of the opinion that the Massachusetts law applies.

"I find that the various agents of the corporation by whom the plaintiff's letters were signed and its invoices receipted were duly authorized."

The letter of June 27, 1899, referred to above and the reply to it were as follows:

"C. M. Warner Branch.
"Boston, June 27, 1899.

"American Malting Co.,
"New York.

"Gentlemen:

"Yours of 23d is at hand, calling our attention to the serious fact that in the acc'ts you have mailed us 'there is considerable over-due and some long past due.' This we acknowledge with regret, and we hope in time to be able to correct this abuse of trust. We have, as you know, built and paid for (not one dollar due on it) a new lager Brewery, costing over $200,000; then we were obliged to stock it with lager; to do this we had to have malt, and, as you know, we take all our malt of the Am. Malting Co. We will get around to even up matters, only asking a little time. We do not suggest allowing us to take some of our supply elsewhere, but if we did so our acct. with you would not increase so fast. We like your malt, it suits us, and have no desire to divide our trade. And we bear in mind our contract with you.

"I find that there is now due the Warner Branch $5223.98; there is also due the Northwood Branch $7151.50, making a total a/c overdue of $12,375.48. The Souther Brewing Co. have never given a note. I would herein enquire if you would not be willing to accept notes of J. K. Souther & Sons, who own a large part of the stock of the Souther Brewing Co., for this overdue acct., adding interest for all time taken on the notes from the day each car became due.

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"I would add that our new lager plant is a success, that our sales for June will be exceeding 6000 bbls., that we expect and believe we shall, before the summer is over, sell 10,000 bbls. a month.

"We would like to send notes as written above to settle everything due to the present moment, if acceptable; if not, we shall have to meet your call, if you will kindly inform us by mail. Meantime we remain,

"Respectfully yours,

"J. K. Souther & Sons,

"J. K. Souther."

"New York, June 28, 1899.

"Messrs. J. K. Souther & Sons,

"Boston, Mass.

"Dear Sirs:

"Replying to your esteemed favor of the 27th inst. would say that we would be pleased to receive notes from you, with interest, for the overdue amounts of our Warner and Northwood Branches, and if you wish would be pleased to accept your notes for everything shipped you so far, having same run on stipulated time of contract.

"We are much pleased to read that you are doing so well with your lager beer brewery and hope your expectation to sell 10,000 barrels per month will be realized. We of course wish to furnish you with the malt used for both breweries, as we interpret the contract with you is to cover your entire needs.

"Hoping this is satisfactory, we are,

"Very truly yours,

"American Malting Company,

"per C. E. Hansen."

The plaintiff presented many requests for rulings and findings. Some of these were granted by the judge, and others were refused by him, raising the questions which are considered in the opinion, where the material facts found by the auditor sufficiently appear.

The judge found that the notes of Souther and Sons should be applied in payment *pro tanto*, and that the plaintiff was entitled to recover the sum of $17,710.65 with interest from

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November 27, 1905, that being the amount due it after such application. At the plaintiff's request the judge reported the case for determination by this court.

G. W. Anderson, for the plaintiff.

S. J. Elder, (*F. E. Bradbury* with him,) for the defendant.

BRALEY, J. The case having been tried before the judge, without a jury, the findings of fact are not open to review, but must be treated as conclusive if there is any evidence to support them. *White Sewing Machine Co.* v. *Phenix Nerve Beverage Co.* 188 Mass. 407, 409, and cases cited.

Unless certain promissory notes made by the partnership to the order of the plaintiff are to be credited as a partial payment the entire amount for which suit has been brought is due. It has been settled law in this jurisdiction for more than a century, that where a debtor delivers to his creditor either his own or the negotiable promissory note of a third party for the whole, or a part of the indebtedness, a presumption arises that it was given and received in satisfaction of the debt, although this presumption may be controlled by evidence that by acceptance the creditor did not intend to extinguish the original claim. *Thacher* v. *Dinsmore*, 5 Mass. 299, 302. *Wiseman* v. *Lyman*, 7 Mass. 286. *Curtis* v. *Hubbard*, 9 Met. 322. *Brigham* v. *Lally*, 130 Mass. 485. *Dodge* v. *Emerson*, 131 Mass. 467. *Green* v. *Russell*, 132 Mass. 536. *Ely* v. *James*, 123 Mass. 36, 44. *Davis* v. *Parsons*, 157 Mass. 584, 587. *Brewer Lumber Co.* v. *Boston & Albany Railroad*, 179 Mass. 228, 234. *Jeffrey* v. *Rosenfeld*, 179 Mass. 506, 509. *Paddock & Fowler Co.* v. *Simmons*, 186 Mass. 152, 153.

But as this rule of evidence was not the law of the plaintiff's place of business where the notes were accepted, it is not applicable unless the contract was to be performed here. *Carnegie* v. *Morrison*, 2 Met. 381, 397. *Tarbox* v. *Childs*, 165 Mass. 408, 411, and cases cited. *Andrews* v. *Pond*, 13 Pet. 65. The auditor, upon whose findings the ruling as to the place of performance rests, not only reports that the malt was to be delivered at Boston * where the title passed and consequently the

* The contract signed by the parties required the delivery of the malt at the Boylston Street railroad station in Boston, freight to be paid by the plaintiff.

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defendant's promise to pay arose, but the notes were made, and were payable here, though sent by mail to the plaintiff. When considered separately the place of the making and performance of the contract of sale were the same, while the notes became completed contracts only upon their acceptance in another State. But this fact is not decisive. The debt due for the malt was payable in this Commonwealth where the performance of this contract began, and the notes given which it is contended were to be applied in payment also were made payable here, and not elsewhere. *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397. When accepted, the acceptance having been according to their tenor, it was ruled correctly that the contract was to be performed at the place selected by the parties. *Carnegie* v. *Morrison, ubi supra. Penobscot & Kennebec Railroad* v. *Bartlett*, 12 Gray, 244, 248. *Shoe & Leather National Bank* v. *Wood*, 142 Mass. 563, 567. *Tarbox* v. *Childs, ubi supra. Andrews* v. *Pond, ubi supra. De Wolf* v. *Johnson*, 10 Wheat. 367, 383. *Chatenay* v. *Brazilian Submarine Telegraph Co.* [1891] 1 Q. B. 79, 82. *Hamlyn* v. *Talisker Distillery*, [1894] A. C. 202. See *Nashua Savings Bank* v. *Sayles*, 184 Mass. 520, 522.

But while under the rulings this presumption must be included as forming a portion of the evidence upon which the finding of payment rests, the plaintiff contends that the entire testimony is insufficient to sustain the finding that there was a written agreement to receive the notes in payment, or that by their acceptance it intended to extinguish a part of the original debt. The inception of this agreement is contained in two letters, which are to be construed with later letters to ascertain whether any or all of the notes were given and accepted in partial liquidation, or as security. Before the organization of the corporation the plaintiff had dealt with the partnership to whose business the defendant had succeeded, and from the auditor's report of their commercial relations, and the letters which passed between them, it is evident that the plaintiff was desirous of retaining the corporation as a customer, and when the arrangement was proposed regarded the financial condition of either as unexceptionable. In less than a year after the contract for malt was entered into the indebtedness on account amounted to a large sum which

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had become overdue. The plaintiff insisted upon payment, and on June 27, 1899, while acknowledging and regretting the delay, the defendant offered by letter the notes of the partnership "to settle everything due to the present moment, if acceptable." To this letter on June 28, 1899, the plaintiff replied "that we would be pleased to receive notes from you, with interest, for the overdue amounts . . . and if you wish would be pleased to accept your notes for everything shipped you so far, having same run on stipulated time of contract." The subsequent correspondence discloses a similar course of dealing as to accruing indebtedness, and when interpreted with reference to the precedent conditions, and of the further finding that at least in one instance the plaintiff returned an invoice receipted as paid, and promised that other invoices should be similarly receipted, these letters with those which followed properly were held to contain an unequivocal proposition to give, and agreement to accept, the notes of the firm in settlement of the open account then payable, and of any account that might become due for future deliveries. *Smith* v. *Faulkner*, 12 Gray, 251, 255. *Proctor* v. *Hartigan*, 139 Mass. 554. *Hebb* v. *Welsh*, 185 Mass. 335. *Bassett* v. *Rogers*, 162 Mass. 47. *Lynn Safe Deposit & Trust Co.* v. *Andrews*, 180 Mass. 527. *Callender, McAuslan & Troup Co.* v. *Flint*, 187 Mass. 104. *Buffington* v. *McNally*, 192 Mass. 198.

If, however, the plaintiff was induced to accept the notes in partial payment by misrepresentations of the defendant acting through its treasurer, upon discovery of the fraud it had the right to rescind, and on rescission its original debt would have been fully restored. While there were material misstatements in the defendant's letter relating to the cost of the brewery, and payment for its construction, to avoid the contract of payment the plaintiff must prove not only an intent to defraud, but that it actually had been misled by the deceit. *Collins* v. *Denison*, 12 Met. 549. *Brady* v. *Finn*, 162 Mass. 260. *Hillyer* v. *Dickinson*, 154 Mass. 502. *Lee* v. *Tarplin*, 183 Mass. 52, 56. Both questions were issues of fact, and the adverse findings that there was no purpose to mislead, as the defendant's treasurer, who also was a member of the firm, believed at the time that the firm was solvent, and that the misrepresentations did not influence the plaintiff's conduct, are supported by the evidence. *Holbrook*

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v. *Burt*, 22 Pick. 546. *Curtis* v. *Aspinwall*, 114 Mass. 187. *Gilfillan* v. *Mawhinney*, 149 Mass. 264, 266.

The remaining requests for rulings must be considered in connection with these special findings, which although adverse to the plaintiff are not shown to have been erroneous, and when thus considered those refused were irrelevant, and the rulings given were correct in law.

Judgment for the plaintiff on the finding.

THOMAS WHITE *vs.* APSLEY RUBBER COMPANY.

Middlesex. November 14, 1906. — February 26, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Abuse of Legal Process. Landlord and Tenant. Agency. Corporation.

One who is arrested and is detained in custody for an appreciable time upon criminal proceedings, which were instituted by the agent of his landlord solely for the purpose of compelling him to surrender possession of the house occupied by him as a tenant, can maintain an action of tort against his landlord for abuse of legal process.

In an action against a corporation for abuse of legal process in instituting criminal proceedings against the plaintiff solely for the purpose of compelling him to surrender possession of a house occupied by him as a tenant, where the defendant contends that the person who instituted the proceedings acted without its authority, if it appears that the house occupied by the plaintiff was leased to the defendant and was placed in charge of the defendant's bookkeeper who let it to the plaintiff for the purpose of keeping a boarding house for the defendant's employees, that the bookkeeper instituted criminal proceedings against the plaintiff and caused him to be arrested for the purpose of getting rid of him as a tenant by forcing him to give up the house, and that a director of the defendant empowered to act as general manager of its business and the defendant's president both had knowledge of the measures taken and either assented to them or declined to interfere, there is evidence to justify a finding that the defendant ratified the acts of its bookkeeper, even if original authority had been wanting, and to warrant a verdict for the plaintiff.

TORT, with two counts for malicious prosecution and two for abuse of criminal process. Writ dated April 4, 1898.

In the Superior Court the case first was tried before *Blodgett*, J., who ordered a verdict for the defendant, and exceptions al-

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leged by the plaintiff were sustained by this court in a decision reported in 181 Mass. 339. There was a new trial before *Bell*, J., at which the plaintiff, before the introduction of evidence, elected to rely upon his fourth count and went to trial upon that count. The fourth count was as follows:

"Fourth Count: The plaintiff says that he was at the time of the occurrence of the events hereinafter stated, and always has been, a man of good repute in the community, and free from crime or the suspicion thereof; that on the second day of March, 1898, he was in the occupation of a certain dwelling house in Hudson, Mass., belonging to one L. D. Apsley, president of the defendant, and in possession of the furniture of the said house, including a certain stove the property of the defendant; and on that day the defendant made a complaint under oath to one Ralph E. Joslin, trial justice in and for said Commonwealth in said Hudson, charging the plaintiff with maliciously and wilfully injuring certain property of the defendant, to wit, by concealing the covers of said stove, to the value of two dollars, and upon such complaint obtained a warrant, and thereupon caused the plaintiff to be arrested on said warrant by a police officer of said Hudson, and while the plaintiff was in the custody of said police officer, the defendant taking advantage of the situation in which the plaintiff was then placed by reason of said arrest, by the abuse of said process, compelled the plaintiff to deliver up to it the possession of the said house and the furniture therein, including the said stove and said stove covers; and to this end, instead of permitting the plaintiff to be taken before a court where he might be heard upon said complaint, caused said police officer to falsely imprison the plaintiff, take him to said dwelling house, and there by the abuse of said process to compel him to deliver up said premises and said furniture, including said stove and said covers, and then to conduct the plaintiff with his family away from said dwelling house and through the streets of said Hudson for a distance of half a mile or more in the middle of the day, and exposed to the observation of all persons who were there, and then to be released by the said police officer, and said warrant to be retained by him and never returned into court; all to the great damage of the plaintiff."

The substance of the evidence is described in the opinion. At

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the close of the evidence the defendant asked the judge to make certain rulings, concluding with a request for a ruling that upon all the evidence the plaintiff was not entitled to recover. The judge refused to make the rulings requested, and submitted the case to the jury with other instructions. The jury returned a verdict for the plaintiff in the sum of $1,058.57; and the defendant alleged exceptions, raising the questions which are considered in the opinion.

J. T. Joslin & G. A. A. Pevey, for the defendant.

F. W. Knowlton, for the plaintiff.

BRALEY, J. While not expressly conceded, yet upon uncontroverted evidence it is manifest that a complaint had been made under R. L. c. 208, § 116, charging the plaintiff with the crime of wilfully and maliciously injuring the personal property of the defendant. A warrant having been issued he was arrested at his home, and after being detained in custody for an appreciable time by the officer serving the process, he was released, while no further steps ever were taken in the prosecution of the case. Upon conflicting evidence, the weight of which was wholly for the jury, they further could find that the criminal proceedings were instituted solely for the purpose of coercing the plaintiff to abandon any claim or right he might have to occupy the house as a tenant, and that when this object had been accomplished by a surrender of his tenancy, and the removal of his family and household goods, he was released from arrest. Indeed, it must have been perfectly plain, if either his evidence or that of his wife was accepted as substantially stating what occurred, that the criminal law was invoked, not for the purpose of vindicating justice, but to get rid of a troublesome tenant. If so found, there was an abuse of criminal process, and this is sufficient to support an action against the instigator and promoter of the wrong. *Wood* v. *Graves*, 144 Mass. 365, 366. *White* v. *Apsley Rubber Co.* 181 Mass. 339.

It is strongly urged that the defendant cannot be held liable, as the wrong was perpetrated without its authority, or subsequent assent. But it is responsible for torts committed by its servants when acting within the scope of their employment, or by ratification may become responsible for such acts when committed in excess of their authority. *Reed* v. *Home Savings*

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Bank, 130 Mass. 443. *Krulevitz* v. *Eastern Railroad*, 140 Mass. 573; *S. C.* 143 Mass. 228. *Fogg* v. *Boston & Lowell Railroad*, 148 Mass. 513. *Nims* v. *Mount Hermon Boys' School*, 160 Mass. 177, 178. *Comerford* v. *West End Street Railway*, 164 Mass. 13, 14. *Telegram Newspaper Co.* v. *Commonwealth*, 172 Mass. 294. *Dempsey* v. *Chambers*, 154 Mass. 330. If, therefore, there was evidence that the prosecution was set on foot by the defendant's bookkeeper while acting as its servant in the discharge of his duties, or that his acts were subsequently ratified, the defendant must respond for the damages suffered. While the title to the premises was in a stranger, yet the defendant, as lessee, was in possession, and rented the property to the plaintiff together with the furniture which it owned, for the purpose of his keeping a boarding house for the accommodation of its employees, and there was evidence from which it could have been found that the general supervision of the rental and management of the house while thus occupied had been entrusted to the defendant's bookkeeper, whose declarations and conduct, consequently, were admissible in evidence. The plaintiff's tenancy was about to be terminated, and apparently he was only waiting for the notice provided by R. L. c. 129, § 12, to vacate the premises, when the bookkeeper made the complaint, gave it to the officer for service, and caused the arrest to be made. If the plaintiff's retention of the stove covers was mistakenly treated as a malicious injury to the personal property belonging to the defendant, yet by his general employment the bookkeeper was authorized to take appropriate action to prevent their wrongful removal, although it now is urged that they were a part of the realty. In the performance of this duty if he acted recklessly, being intent on ejecting the plaintiff, by using the criminal process as a means of compelling him to vacate, the defendant is liable for his tortious act. *Aiken* v. *Holyoke Street Railway*, 184 Mass. 269, 274. Besides, if original authority were wanting, there was evidence from which ratification could be found, for a director of the defendant empowered to act as a general manager of its business, and the president of the company, each had knowledge of the measures taken, and either assented, or declined to interfere. *Beacon Trust Co.* v. *Souther*, 183 Mass. 413, 416, 417.

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What already has been said concerning the issues at the trial, and the supporting evidence, disposes of the exceptions to the refusals to rule as requested, for these requests so far as applicable were embodied in other language in instructions which fully and accurately stated the law. *Graham* v. *Middleby*, 185 Mass. 349, 354. *White* v. *Apsley Rubber Co.*, *ubi supra*.

Exceptions overruled.

OLD CORNER BOOK STORE *vs.* HENRY M. UPHAM & another.

Suffolk. December 3, 1906. — February 26, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Sale. Good Will. Partnership. Equity Jurisdiction, To enforce negative contract, Accounting. *Equity Pleading and Practice,* Appeal, Amendment.

In this Commonwealth when a man voluntarily sells the good will of his business he thereby agrees not to set up a competing business which will derogate from the good will that he has sold, and the question whether a new business set up by him is in derogation of his sale is one of fact relating to the character of the business sold and of that set up.

If a partner in a firm engaged in a long established book trade, with a department for the sale of books used in and in connection with the Episcopal church, which is under his immediate personal control and direction, sells and assigns to his only partner all his interest in the business and its assets including all his interest in the good will of the business, and thereafter organizes a corporation bearing his name, which in the same city not far from the old place of business carries on a book selling business established principally to sell church books to persons of the Episcopal church, the partner who purchased the good will, or his assignee, may maintain a suit in equity against the partner who sold it and the corporation he has organized, to restrain the individual defendant from working for or holding stock in or being connected with the corporation and for an accounting for the damages which the plaintiff has suffered from that defendant's breach of his contract, and to enjoin the corporation from employing the individual defendant in its business or recognizing him as a stockholder except to permit him to sell his shares of stock or to receive what is due upon them on the winding up of the corporation.

On an appeal from a decree in equity where the whole case is before this court on a report of all the evidence without special findings of fact, the case is to be disposed of as it should have been disposed of by the judge who heard the evidence, except so far as the general finding of the judge after seeing the witnesses affects the case, and it is competent for the parties to put forward in this court contentions justified by the evidence which were not presented below. More-

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over this court in the exercise of its discretion may order any amendments to be made in the pleadings which are necessary to meet the case presented on the evidence.

LORING, J. This is an appeal from a final decree of the Superior Court dismissing the plaintiff's bill. It comes before us on all the evidence, without special findings of fact.

It appears from the evidence that the defendant Upham was employed as a clerk in the Old Corner Book Store from 1866 to 1872. In 1872 he became a partner and thereafter carried on the book trade at that store (as a partner or alone) until October 30, 1902, when he sold his interest therein to his then partner, George A. Moore. Moore paid Upham for his interest (it was a two thirds interest) in the partnership $35,000, and by the terms of the assignment Upham sold and assigned to Moore (among other things) all his interest in the stock in trade of the partnership "and all other assets of said firm and of the business heretofore conducted by said Moore and myself under the name of Damrell and Upham, and including all my interest in the good will of said business." In the following month, that is to say, in November, 1902, Moore organized the plaintiff corporation and sold and assigned to it all his stock in trade "and all other assets, pertaining to the business now carried on by me, and recently carried on by one Upham and myself, under the name and style of Damrell and Upham, including the good will of said business."

The defendant Upham then went abroad. On his return he was for a time engaged as the assistant treasurer of a milk company, and later in real estate and insurance business. In the summer of 1905 he conceived the idea of establishing a book store in Boston, primarily for the sale of books used in the Episcopal church, and secondarily for the general trade of a book store.

It appears in the evidence that from the time that Upham became an employee of the Old Corner Book Store until he sold his interest to Moore in October, 1902, a period of some thirty-six years, a part of the business carried on there was the selling of books used in or in connection with the Episcopal church. It further appears that Upham was employed in that department when he first came to the store; that from the

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time when he became a partner until he sold his interest to Moore in 1902 that department of the business was under his special direction and control, with this qualification: During the last three years he had to devote himself to the financial affairs of the partnership and therefore left the church department more to one Wentworth, who, at the time the defendant corporation was organized, had been employed in that department of the Old Corner Book Store and its successor the plaintiff corporation, for ten years, with a short interruption.

The defendant Upham testified that while he was connected with the Old Corner Book Store that store was "the most prominent church depository" in Boston. And by this we understand him to mean that it was the most prominent store in Boston for the sale of church books, or at any rate for the sale of Episcopal church books. He further testified that the business of the new corporation was intended to be and was a business which was to compete with that of the plaintiff corporation.

The plaintiff corporation has continued the business sold to its assignor by the defendant Upham, including the church department just described, and as we have said Wentworth who in December, 1905, entered the defendants' employ then was conducting that department for the plaintiff.

The defendant Upham on his own testimony was and is very active in the Episcopal church. He has been the treasurer of the Episcopalian Club since its organization about 1888. This club consists of some two hundred or more Episcopalians. It also appeared in evidence that he was treasurer of the Margaret Coffin Prayer Book Society, which seems to be a society for the sale or distribution of Episcopal prayer books.

After conceiving the idea of setting up a rival book store the defendant Upham's next move was to solicit personally and through some one employed by him for the purpose men prominent in the Episcopal church to subscribe to shares in a corporation to be organized to carry on the business which he proposed to set up. Some of these men were admitted by him to have been customers of the Old Corner Book Store, and all of them were men in the Episcopal church. He succeeded in getting thirty persons to subscribe to stock.

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The result of this solicitation on the part of the defendant Upham was the organization of the defendant corporation on November 29, 1905. The name of the corporation was that of the defendant Upham, to wit, "H. M. Upham Company." The business of the corporation is stated in the agreement of association to be "To conduct a depository for the Episcopal church and to carry on a general book business and any other matters connected therewith." The corporation opened a store at No. 15 A, Beacon Street, on December 7, 1905. On December 23, 1905, this bill was filed. The suit went to a hearing on January 10 and 11, 1906, and the final decree dismissing the bill was entered on January 15, 1906.

It appeared that the plaintiff corporation had moved its store from the corner of Washington and School streets to Bromfield Street, and that it was situated there in November and December, 1905. It further appeared that this was five minutes' walk from the defendant corporation's store at 15 A, Beacon Street.

On the day before the opening of the store of the defendant corporation the defendant Upham sent some twelve hundred cards to persons in the residential part of Boston; he also sent cards to all the clergy of the diocese of Massachusetts.

So far as appeared the only persons employed in the store of the defendant corporation were the defendant Upham and Wentworth, who already has been spoken of as having been employed under Upham in the church department of the Old Corner Book Store. In November, 1905, Wentworth was an employee of the plaintiff, in charge of its church department, and he left that employment to enter into that of the defendant corporation.

We have not found it necessary to go into some further details attending the organization and make-up of the defendant corporation, nor into the circumstances under which Wentworth left the service of the plaintiff to take service with the defendant. The facts which have been stated were not in dispute, and those facts, in our opinion, are decisive of the merits of the suit now before us.

It is settled in this Commonwealth that when a man voluntarily sells the good will of his business he thereby precludes himself from setting up a competing business which will derogate from the good will which he has sold. *Angier* v. *Webber*,

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14 Allen, 211. *Dwight* v. *Hamilton*, 113 Mass. 175. *Munsey* v. *Butterfield*, 133 Mass. 492. *Webster* v. *Webster*, 180 Mass. 310, 315, 316. *Hutchinson* v. *Nay*, 187 Mass. 262, 265.

In each case where the good will of a business is sold and the vendor sets up a competing business it is a question of fact whether, having regard to the character of the business sold and that set up, the new business does or does not derogate from the grant made by that sale. In *Bassett* v. *Percival*, 5 Allen, 345, and in *Hoxie* v. *Chaney*, 143 Mass. 592, it was held that the new business did not derogate from the grant, while the contrary conclusion was come to in the cases before the court in *Angier* v. *Webber*, 14 Allen, 211, *Dwight* v. *Hamilton*, 113 Mass. 175, *Munsey* v. *Butterfield*, 133 Mass. 492.

In the case at bar but one conclusion can in our opinion be reached on that question of fact.

The good will sold included the good will of a department carried on for at least thirty-six years, and for the last thirty years under the immediate personal direction and control of the defendant Upham; and that department was a department for the sale of books used in and in connection with the Episcopal church and was the most prominent department or store for the sale of such books in Boston during that period. This business it should be remarked had a limited class of customers, for the customers are of necessity limited to those belonging to or interested in the Episcopal church. The defendant under whose direction this department in the old business was conducted was and is prominent in and among Episcopalians. It was under these circumstances that this defendant sold the good will of the business which included that department.

There could be no question as to the effect which the new business started by the defendant Upham was going to have upon the good will of the business which the defendant Upham sold, and which had come to the plaintiff. We speak of the effect which the new business was going to have because the hearing took place only a month and three days after the new store was opened.

The new business is primarily to sell church books to Episcopal church people. It was started at the solicitation of the defendant Upham, who is prominent in Episcopal church circles.

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Its stockholders are all of them men of the Episcopal church, and its store is within five minutes' walk of the plaintiff's store.

The defendants have invoked the rule that the decree of a single justice who heard the witnesses is not to be set aside unless plainly wrong, citing *James* v. *Lewis*, 189 Mass. 134; *Dickinson* v. *Todd*, 172 Mass. 183; *Evans* v. *Strachan-Hanscom*, 171 Mass. 64. That is true. The reason of the rule is that the single justice who sees the witnesses has a better opportunity to decide on their credibility, and the rule is limited accordingly. For that reason the rule does not apply when all the evidence before the single justice is documentary. *Harvey-Watts Co.* v. *Worcester Umbrella Co.* 193 Mass. 188. This rule does not confine the parties in this court to a consideration of points raised in the court below. The whole case is before this court, in case of an appeal on all the evidence, to be disposed of on that evidence as it should have been disposed of by the judge who heard it in the first instance, except so far as the fact that he has made a finding after seeing the witnesses affects the situation. It is competent for the parties to put forward in this court contentions justified by the evidence which were not raised below. And it is competent for this court in the exercise of its discretion to order all the necessary amendments to be made in the pleadings to meet the case made out on the evidence.

There is nothing therefore in the defendants' contention that the question which we have discussed here is not open in this case.

We are of opinion that, on the uncontradicted facts in the case at bar, if the business set up by the defendant corporation had been set up by Upham personally, it would have been in derogation of his grant, and that the plaintiff is entitled to an injunction perpetually restraining the defendant Upham from working for or holding stock in or otherwise being connected directly or indirectly with the defendant corporation; and to have an accounting as against the defendant Upham for the damages which it has suffered from his breach of contract. The plaintiff is also entitled to have the defendant corporation perpetually enjoined from employing directly or indirectly the defendant Upham in its business, or recognizing him as a stockholder therein or otherwise connected therewith except to allow him to sell his share

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of stock or to receive what is due in respect thereof on the corporation being wound up.

The further rights of the plaintiff against the defendant corporation remain for consideration. Its counsel has taken this position in his brief: "The corporation, H. M. Upham Company, was a *bona fide* corporation, and not merely H. M. Upham in another form. It was composed of many stockholders besides Upham. It had a right to its name — at least so far as the present plaintiff is concerned. It had no contractual relationship of any kind with the plaintiff, and had not in fact received any transfer of any good will of Damrell and Upham. It is difficult to see on what theory it did not have the right to engage in the retail book business and to solicit the customers of the old firm."

We agree that as matter of fact the defendant corporation is not Upham in another form.

We also agree that the day after Upham sold his good will to Moore, the persons (other than Upham) who now constitute the defendant corporation could have organized that corporation and opened a store for the sale of Episcopal church books, and, if they had pleased, could have opened that store in the building next to the Old Corner Book Store.

But the difficulty here is that the defendant corporation is not an independent body, and that it is the creation of the defendant Upham, brought into being by him in violation of the implied contract entered into by him with Moore in selling his good will to him. The very name which it bears to-day and which it will bear hereafter is and must remain a mark in the trade of that fact.

What remedy the plaintiff is entitled to against the defendant corporation under the findings of fact which we have made has not been argued by counsel. It is possible that it never will arise. As the case must go back for an accounting in any event, we do not think it necessary to come to a decision on that point now.

Decree accordingly.

A. H. Russell, for the plaintiff.

G. R. Nutter, for the defendants.

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STEPHEN JENNINGS *vs.* DANIEL L. DEMMON.

Suffolk. December 3, 4, 1906. — February 26, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Equity Pleading and Practice, Appeal, Costs. *Equity Jurisdiction*, To establish equitable mortgage. *Frauds, Statute of. Evidence*, Extrinsic affecting writings.

On an appeal from a decree in equity where all the evidence is reported and the evidence, which was in large part oral, is conflicting, the decision of the judge who heard the witnesses will not be set aside if there is evidence on which his finding is warranted.

In a suit in equity to establish an equitable mortgage the plaintiff may show by oral evidence that a deed absolute on its face was given as security and was intended as a mortgage, and there is nothing in the statute of frauds which prevents this.

On an appeal from a decree in equity ordering that the bill be dismissed without costs, this court in affirming the decree ordered that before such affirmation it be modified so as to include the costs of the appeal.

BILL IN EQUITY, substituted by amendment on March 8, 1906, as of December 14, 1904, by the assignee by mesne conveyances from Alfred A. Marcus to establish an equitable mortgage upon certain real estate on Harvard Place in Boston, praying for an account and for a redemption.

The bill alleged in substance that Marcus, having negotiated with one Millis for the purchase of the real estate named, arranged with the defendant to furnish the consideration and to take the title in his own name by a deed absolute in form but in fact as security for the amount of his advances upon terms which were more fully set forth in an agreement in writing alleged to have been entered into between Marcus and the defendant. The answer alleged in substance that the defendant purchased the property in question in July, 1887, on his own account, and has since held it free from all trust and obligations to Marcus, and set up the statute of frauds, the statute of limitations and laches.

It was not controverted that on June 13, 1887, Millis, acting for himself and others, the owners of the Harvard Place estate, agreed in writing to convey to Alfred A. Marcus or order the estate in question for $55,000 above a mortgage of $25,000, of which $5,000 was to be paid upon delivery of the agreement

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and the balance within twenty days from the date thereof. Upon this agreement was indorsed the following:

"The foregoing agreement is hereby assigned, transferred, and set over for value received to Daniel L. Demmon, to whose order the deed shall be made and who shall hold this agreement and the deed under it as security for any money he may advance to secure the deed, and all such payments shall be endorsed thereon.

"Rec'd on above $5000.
" " " $5000.

"June 20, 1887.

"Alfred A. Marcus."

On June 28 this agreement was extended until July 20, 1887. This agreement passed into the custody of Demmon at the time of its assignment to him, and was kept by him after that time.

Under date of July 19, 1887, Millis and others, the owners of the property in question, conveyed it to Marcus, who, by deed dated July 20, 1887, conveyed it to the defendant. In the making of these instruments and in the search of the title to the estate, one Baxter E. Perry, an attorney at law, acted as counsel for both the defendant and Marcus. Demmon had no part in the transactions resulting in the sale from Millis to Marcus other than to pay the money. The consideration for the conveyance was paid by the defendant by three checks dated respectively June 20, 1887, June 28, 1887, and July 20, 1887, all to the order of Perry and for the amounts respectively of $5,000, $5,000, and $45,000, which Perry turned over to Millis for the owners of the estate. Marcus died before the filing of the bill.

In the Superior Court the case was heard upon documentary evidence and oral testimony. The documentary evidence consisted of the agreement of June 13, 1887, and the assignment thereof to Demmon, various deeds affecting the title to the estate, including those from Millis to Marcus and Marcus to the defendant under date of July 19 and July 20, 1887, respectively, the checks of Demmon to Perry and a schedule of assets made by Marcus in insolvency proceedings in December, 1894, in which was this item, "Estate on Harvard Place, half interest, held by Daniel L. Demmon as collateral," and the depo-

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sition of Baxter E. Perry, who at the time it was taken was seventy-eight years old and had been for several years in feeble health. He deposed in substance that he knew about the transaction in question, and that at the time he drafted an agreement in writing between Demmon and Marcus, which provided that the defendant was to advance about $65,000 for the purchase of the property, was to take the title as security for the advances and interest thereon at six per cent, and the sum of $1,500 as bonus, all in the nature of a mortgage which could be redeemed on payment of these sums within six months, and that, if Marcus did not redeem within that time, the defendant should hold the title as absolute and free and could sell at any time for any price he chose, but that the excess of price received over the amount due to Demmon and the further sum of $10,000 should be divided equally between Marcus and Demmon, and that the income over the carrying charges of the estate should be held by Demmon in equal shares for himself and Marcus, and that he collected the rents for the benefit of Marcus until the expiration of the time limited for redemption; that this agreement was executed in duplicate, one taken by the defendant and the other retained by the deponent for Marcus; that he missed the agreement within four or six months after its execution, although before its loss Marcus examined it several times, and that since then he had made diligent search for it many times and had been unable to find it.

Several witnesses testified orally that at different times Marcus had described to them the contents of the lost agreement between him and Demmon, one relating the substance of it to be that upon a sale of the property after the expiration of six months, Demmon and Marcus were to divide in equal shares the net profits arising from the land, and saying nothing about any bonus to Demmon; another testifying that if the sale was made within the six months Demmon was to get a bonus of $1,500 or $2,000, and that after the expiration of six months Demmon might take the property and sell it, and that when he did sell it there was to be an accounting in which all rents were to be credited after deducting expenses and interest on any money advanced by Demmon, together with a bonus of $10,000 to him, and the balance was to go to Marcus.

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The defendant testified that he took the assignment of the option as security for the two payments of $5,000 each, which he advanced to Marcus, and that when July 20, 1887, came, Marcus owned up that he could not pay for the property, not having advanced a penny toward its purchase, and that thereupon the defendant paid the remaining $45,000 of the purchase price through Perry, thereby closing the transaction and acquiring for himself the absolute and unqualified title to the property, free from all obligation to Marcus.

The defendant's testimony, although not clear upon this point, appeared to assert that he began the collection of rents as soon as he received the deed of the property, and there was some corroboration of this from other sources. There was testimony showing that the reputation of Marcus for truth and veracity was bad.

The Superior Court on December 14, 1904, made an order appointing a commissioner to report the evidence to this court, and on January 1, 1906, after a hearing, made a final decree that the bill be dismissed without costs. The plaintiff appealed.

W. C. Cogswell, for the plaintiff.

B. G. Davis, (*H. S. MacPherson & E. F. Damon* with him,) for the defendant.

RUGG, J. This appeal brings before us the questions of fact as well as of law raised upon the trial in the Superior Court, and it becomes our duty to examine with care the evidence and determine the case according to our own judgment. But in reaching this determination, due weight is to be given to the decision of the trial judge and it is not to be set aside unless it appears to be clearly erroneous. Properly and necessarily, great consideration must be given to the conclusions of fact reached by the judge who hears the evidence, where it is in large part oral, for he has opportunities to pass upon the degree of credibility to be given to the testimony of the witnesses which no appellate tribunal possesses. In the present case, the trial judge made no memorandum of findings of fact or rulings of law, but simply ordered a decree to be entered dismissing the bill. The single question to be determined, therefore, is whether upon all the evidence this finding was plainly wrong.

If the evidence proves the allegations in the bill, the plain-

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tiff is entitled to a decree in his favor, for a conveyance, although absolute in form, may be shown by oral proof to have been made in trust or by way of security. There is nothing in the statute of frauds which prevents this result. *Campbell* v. *Dearborn*, 109 Mass. 130. It has not been contended in argument that the plaintiff's claim is barred by the statute of limitations.

The plaintiff has argued cogently that the evidence shows the execution and delivery of an agreement in writing, now lost, between Marcus and the defendant, providing that the conveyance to the latter was in trust for the benefit of Marcus, or in way of equitable mortgage. There are many circumstances which support this contention, but they do not point so conclusively to this view as to demonstrate that the opposite conclusion cannot also be supported by certain aspects of the evidence. If no such agreement was made, as was contended by the defendant, and the only contract between Marcus and the defendant was the one of June 13, 1887, and if this was terminated at its expiration by the absolute conveyance from Marcus to Demmon, then the plaintiff failed to make out his case. There was testimony in support of all these propositions. When these circumstances are considered in connection with the facts that after the loss of the copy of the alleged agreement belonging to Marcus in the possession of Perry, no effort was made by Marcus or Perry to procure the copy from Demmon or in any way to perpetuate the evidence of its existence and contents, and that it was not contended that anything had been said to Demmon about it during all these years, it cannot be said that a finding adverse to the plaintiff would not be fully warranted.

It would serve no useful purpose to review the evidence in detail and weigh the inferences on the one side and the other which might fairly be drawn from it. The conclusion finally to be reached depends in large measure upon the degree of credibility to be attached to the testimony of the several witnesses. According to the decision of the Superior Court the influence to which it is entitled and upon a careful consideration of all the evidence, it does not appear that the plaintiff has sustained the burden of proving his case. It is not necessary, therefore, to consider the question of laches. The decree is to be so far modi-

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fied as to include the costs of this appeal and as modified should be affirmed. *Graves* v. *Hicks*, 191 Mass. 102.

So ordered.

MAUDE M. KERSHAW *vs.* ARTHUR MERRITT.

Suffolk. December 4, 1906. — February 26, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Husband and Wife. Estoppel. Equity Jurisdiction, Equitable replevin. *Equity Pleading and Practice*, Master's report.

A wife by placing personal chattels belonging to her in the possession of her husband who pledges them to one advancing money on them in good faith is not estopped to assert her title to the chattels, and can maintain a suit of equitable replevin against the pledgee to recover possession of them.

In a suit of equitable replevin by a wife to recover possession of certain chattels pledged to the defendant by the plaintiff's husband and alleged to belong to the plaintiff, a master ruled that the plaintiff could maintain her bill and was entitled to recover possession of the chattels, and found that the plaintiff had no actual knowledge at the time of her husband's pledging the chattels to the defendant, that she never expressly authorized her husband to pledge them, and never expressly assented to or ratified the pledge after it had been made. He added "But if such knowledge, assent and ratification can be implied in law from the agency of her husband and her own acts as herein reported, then I find that she cannot maintain her bill." Facts were stated in the master's report which would have warranted a finding that the plaintiff in fact knew of the pledge of her property by her husband and either consented to it originally or afterwards ratified it. *Held*, that the meaning of the sentence quoted from the master's report was that the bill could not be maintained if the plaintiff's knowledge was to be implied as matter of law, and that it did not mean that she could not maintain her bill if her knowledge as matter of law could be implied in fact, and a decree for the plaintiff made by the Superior Court upon the master's report was affirmed by this court.

LORING, J. This case was submitted to the Superior Court on the report of a master to which the defendant took no exceptions. On that report the Superior Court entered a final decree for the plaintiff, from which the defendant took the appeal now before us.

The bill is a bill of equitable replevin, brought by a wife to recover from the defendant her personal property (consisting principally if not entirely of wedding presents) which had been

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pledged with the defendant by the plaintiff's husband, on June 3, 1902 (together with some personal property owned by the husband), as security for a loan of $2,500 due from the husband to the defendant.

The plaintiff and her husband are English people who came to this country in 1900, bringing with them the personal property here in question. The husband was at first employed in a mill at Lowell, and there made the acquaintance of the defendant. In February, 1902, the defendant lent the husband $800, and again between February and May of that year $700 more, without security. In May of that year the husband and the plaintiff, being desirous of returning to England and not having the money necessary to pay their debts and the expense of the return, the husband applied to the defendant for a further loan of such amount that the whole amount due would be $2,500. The defendant agreed to make the further advance if he received security for what had been lent already as well as for the fresh advances. The husband agreed to give as security "his household goods at Lowell," and asked the defendant to come to Lowell and inspect them. The plaintiff was not present at this conversation.

In accordance with the arrangement made with the plaintiff's husband, the defendant went to Lowell on May 17, 1903, and inspected the goods which the husband had agreed to give him as security, at the house in which the plaintiff and her husband then were living. He found the most valuable of the articles here in question consisting of silver, cutlery, bric-à-brac and china, collected together in one room. The silver and cutlery had been polished by the plaintiff and her husband "shortly" before this visit, and were at that time "arranged in boxes and cases as though for display." The plaintiff was present and "exhibited" several articles to the defendant, called his attention to their beauty and value, and said that they were worth $5,000. She told him that they were her wedding presents, and spoke of "the whole collection as 'our' goods."

The plaintiff testified that the articles were collected together in one room "incidental to cleaning" and for the convenience of the packers and not for the purpose of exhibiting them as security for a loan; that she exhibited them to the defendant

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as a matter of family pride to show that they were not destitute although for the moment "in somewhat straitened circumstances," and that she had several neighbors in to see them the day before they were exhibited to the defendant.

At this interview the plaintiff and her husband "were talking of where they should store the goods, and they mentioned storing them in a regular public storage-house." Thereupon the defendant said: "It is no use of these things going into a public storehouse, when I can store them at my place, and it will cost nothing, and will be safer. We will have them under our own eye." To this the plaintiff assented, and the defendant gave her husband directions in her presence as to marking the contents of the cases in which the goods were to be packed and as to shipping them to the defendant's house in Milton.

On May 19 the plaintiff's husband made a list of the articles including those here in question.

On May 31, 1902, all the goods were delivered to a carrier and were taken by him to the defendant's house in Milton, where they now are. On the same day the defendant's attorney drew a written agreement of pledge of all the goods mentioned in the list, which agreement was executed by the husband on June 3, 1902. On the following day the plaintiff and her husband sailed for Europe.

In November, 1903, the plaintiff returned to the United States. At that time her husband was in the defendant's employ. He left that employment in April, 1904. Soon after leaving the defendant's employ the husband asked for the goods, as he and his wife were going to housekeeping. The defendant refused to deliver them up until the loan was paid. A few days later an oral demand for the goods was made by an attorney in the name of the husband.

On May 5, 1904, the same attorney, in behalf of the plaintiff, demanded the goods here in question, stating that they belonged to her, and upon the defendant's refusal this bill was brought.

The master found that the defendant acted throughout in good faith, believing that the husband was the owner of the goods and had the right to pledge them as he did.

The master ruled "that the complainant was not estopped by her acts to deny that she assented to the transactions relating

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to said goods between her husband James Kershaw and the respondent," and "that she could maintain her bill and was entitled to recover possession of the goods enumerated in the schedule thereto annexed." After the statement of that ruling the report continues, and ends in these words: "At the request of the respondent, and under the objection of the complainant, I find that with regard to all transactions herein reported relating to the goods in question, except the making affidavit before the United States Consul at Liverpool, and the pledging of the goods to the respondent, Mr. Kershaw acted as the agent of the complainant. There was no evidence that the respondent knew of any transactions with regard to the goods other than that in which he was personally concerned.

"At the request of the respondent, and under the objection of the complainant, I further find that the complainant had no actual knowledge at the time of her husband's pledging said goods to the respondent; that she never expressly authorized her husband to pledge them, and never expressly assented to, or ratified the pledge after it had been made. But if such knowledge, assent and ratification can be implied in law from the agency of her husband and her own acts as herein reported, then I find that she cannot maintain her bill."

The defendant's first contention is that the plaintiff is estopped because she clothed her husband with possession of the goods without reserve, and the master has found that in regard to all transactions stated in his report except the affidavit at Liverpool and the pledging of the goods, the husband acted as agent of the plaintiff. The transactions specified by the defendant as those on which he relies in this connection are the two demands made by the husband for the goods, one in person, the other through the attorney who afterwards acted for the plaintiff.

But in the first place the plaintiff did not clothe her husband with the possession of these goods without reserve, and in the second place she would not have been estopped if she had. An owner of personalty is not estopped from claiming his property in it by putting it in the possession of another, no matter what the other may do with it and no matter what reliance may be put by a third person on the possession. The cases are col-

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lected in *Rogers* v. *Dutton*, 182 Mass. 187. There is nothing to the contrary in the cases of *Jacobs* v. *Hesler*, 113 Mass. 157, and *Clark* v. *Patterson*, 158 Mass. 388, relied on by the defendant. What was decided there was that a wife has no claim against her husband's estate if she entrusts money or negotiable securities to him without evidence as to the terms on which they were entrusted.

The other contention made by the defendant consists in an argument showing that the facts stated in the master's report warranted a finding that the plaintiff in fact knew of the pledge of her property by her husband and either consented to it originally or afterwards ratified it. We agree with that contention, but it is not material here. In other words we do not agree with the construction put by the defendant on the master's report. The master's report concludes with a finding that the plaintiff cannot maintain her bill if knowledge on the part of the plaintiff as to her husband's pledging her goods "can be implied in law from the agency of her husband and her own acts as herein reported." That means if her knowledge is to be implied as matter of law. It does not mean if her knowledge can as matter of law be implied in fact. Whether it was or was not to be implied was a question of fact for the master, on which he has found against the defendant. The entry must be

Decree affirmed.

The case was submitted on briefs.

W. F. Merritt & N. T. Merritt, Jr., for the defendant.

W. M. Lindsay, for the plaintiff.

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GERTRUDE S. CLEAVELAND & another *vs.* CHARLES M. DRAPER, administrator.

Suffolk. December 4, 1906. — February 26, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, LORING, & RUGG, JJ.

Executor and Administrator. Probate Court. Practice, Civil, Decree.

An administrator who in good faith and without negligence makes a distribution of the estate of his intestate under and in accordance with a decree of the Probate Court will be protected from liability, although it afterwards appears that he distributed the estate to the wrong persons and the decree of distribution is revised accordingly.

On a petition in the Probate Court for a decree of distribution of the estate of an intestate after the revocation of a former decree of the same court for the distribution of the same estate which declared that a certain person was the only person entitled to the balance of the estate, under which the whole balance of the estate was paid to him, if it appears that the petitioners are entitled to such balance of the estate and that the person to whom it was paid was not entitled to any of it, but that the administrator in good faith and without negligence made the payment under and in accordance with the previous decree of the Probate Court, afterwards revoked, the new decree of distribution should affirm the former decree except in correcting the error as to the persons entitled to receive the balance of the estate and should not require the administrator to take further action or impose upon him any liability

PETITION, filed in the Probate Court for the county of Suffolk on October 30, 1905, by Gertrude S. Cleaveland of San Francisco in the State of California and Mary A. Vore of Chicago in the State of Illinois, praying for a decree of distribution of the estate of Sarah A. Ellis, late of Boston.

In the Probate Court *Grant*, J. made the following decree:

"At a probate court holden at Boston in and for the said county of Suffolk on the fourth day of April in the year of our Lord one thousand nine hundred and six:

"On the petition of Gertrude S. Cleaveland of San Francisco in the State of California, and Mary A. Vore of Chicago in the State of Illinois, praying for a decree of distribution of the estate of Sarah A. Ellis, late of said Boston, deceased, all persons interested having had due notice of said petition according to the order of said court: now, after hearing the parties, it appears to the court that Charles M. Draper was appointed public

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administrator of the estate of said Sarah A. Ellis, June 6, 1901; that on February 27, 1904, a decree of distribution was entered by said court, after notice as ordered by the court, ordering the said public administrator to pay over the balance of seventeen hundred fifty-nine and 75/100 dollars in his hands to Frank H. Skinner, as the only person entitled thereto; that said public administrator paid over said balance to said Frank H. Skinner in pursuance of said order; that on March 1, 1905, said court, after said payment by said public administrator, revoked said order of distribution for the purpose of correcting a mistake of fact. It further appears that at the time of the death of said Sarah A. Ellis there were three grandchildren surviving her, being the petitioners and Joseph French Ellis, children of a deceased son, George W. Ellis, the said George W. Ellis having died prior to the death of said Sarah A. Ellis. It further appears that the said Joseph French Ellis died on April 1, 1902, intestate, leaving the petitioners as his only heirs at law. Now it appearing that the decree of February 27, 1904, finding Frank H. Skinner to be the only heir at law, and ordering the administrator to pay the balance of the estate to him, was made under misapprehension of fact, and that said Frank H. Skinner was not the person entitled to said balance; and it further appearing that the said petitioners, Gertrude S. Cleaveland and Mary A. Vore, and the legal representative of the estate of the said Joseph French Ellis are the persons entitled to said balance in equal shares, it is decreed that said decree of February 27, 1904, be reaffirmed except so far as it finds Frank H. Skinner to be the only person entitled to the balance of said estate; and it is further decreed that said Gertrude S. Cleaveland and Mary A. Vore and the legal representative of the estate of Joseph French Ellis are the persons entitled to said balance, one third part to each. But it appearing that all of said balance has been paid to said Frank H. Skinner by the administrator in good faith under the authority and direction of said decree and order of February 27, 1904, this decree shall not require the administrator to take further action, nor impose upon him any liability, but it shall take effect only to correct the error of said former decree and order, and to establish the rights of the petitioners and the estate of said Joseph French Ellis to their distributive

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shares of said estate of Sarah A. Ellis, as against the said Frank H. Skinner, to whom payment has been made, and to give to them and to the administrator such rights as against said Frank H. Skinner as arise from the correction of the error of the decree of February 27, 1904."

The petitioners appealed, and the case came on to be heard by *Sheldon*, J., who reserved it upon the pleadings and an agreed statement of facts for determination by the full court.

A. H. Russell, for the petitioners.

C. M. Draper, *pro se*, was given leave to file a brief later, but did not do so.

KNOWLTON, C. J. These appellants from a decree of the Probate Court are the heirs at law and next of kin of Sarah A. Ellis, of whose estate the respondent is administrator. Nearly three years after the respondent's appointment, an order of distribution of the personal estate in his hands was duly made by the Probate Court, directing the payment of the entire balance to Frank H. Skinner, a nephew of the deceased, who was adjudged by the court to be her next of kin. These petitioners are her grandchildren. The intestate died on November 20, 1899. The administrator ascertained from Augustus H. Ellis, a nephew of her deceased husband, who was her only connection then known, and whose relations with her were such as should have made him conversant with her affairs, that the intestate's son, George W. Ellis moved to Chicago, Illinois, where it was reported that he was married and had three children, Edwin S., Joseph F. and Gertrude. It also was ascertained that he returned to Massachusetts and died at Canton in 1876. Augustus H. Ellis informed counsel that he was of opinion that the children of George W. Ellis, if any survived him, remained in Chicago and never lived in Massachusetts. In February and March, 1900, counsel caused a notice asking for information in regard to these persons by name, in such form as would be likely to bring a response if it came to their knowledge, to be published six times in the Chicago Daily News, a newspaper supposed to have the largest circulation of any in Chicago. In response to this, one Ida Norris appeared, and proved herself to have been the wife of Edwin S. Ellis, having married since his death. From her it was ascertained

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that Edwin S. Ellis had a brother Joseph F. and a sister Gertrude, that Gertrude had married one Frank Cleaveland who was reported to be engaged in the hotel business in Portland, Oregon, and that Joseph F. Ellis, to the best of her information, was then living in Chicago. Thereupon, on April 10, 1900, letters were addressed to Mrs. Frank Cleaveland, Portland, Oregon, and to Joseph F. Ellis, Chicago, Illinois. These letters were returned by the post office department, undelivered. In February, 1902, Ida Norris informed counsel that she had been unable, by examination of directories and by inquiries, to obtain any further information as to the whereabouts of either of these persons, except a rumor that one of them had died. She said that her latest information was that Gertrude had been living fourteen years before, and Joseph F. Ellis twelve years before. No mention was made of the petitioner, Mary A. Vore. The counsel made no further search, but communicated these facts to the administrator. In September, 1903, the administrator published a notice in the Boston Herald, saying that if the heirs of George Ellis, resident of Boston in 1878, would address Box 1843, Boston, they would learn something to their advantage. Having received no reply to this advertisement, nor any further information, he paid over the money to Skinner under the order of distribution, about seven months later.

The petitioners had no knowledge of any of these things until after the money had been paid. Upon their petition, a decree of the Probate Court was entered on March 1, 1905, revoking the order of distribution. The proceedings now before us are upon their subsequent petition for an order of distribution directing the payment of the money to them. On this petition an order was entered reaffirming the former decree, except so far as it finds Frank H. Skinner to be the only person entitled to the balance of said estate, and decreeing that these petitioners and the legal representative of the estate of Joseph F. Ellis are entitled to this balance, each to one third part. The decree also recites that, it appearing that all of said balance has been paid to Frank H. Skinner by the administrator in good faith, under the authority and direction of the decree and order of February 27, 1904, this decree shall not require the administrator to take further action, but it shall take effect only to correct the error

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of said former decree, and to establish the rights of the petitioners and the estate of Joseph F. Ellis to their distributive shares in the estate of Sarah A. Ellis, etc.

The decree appealed from follows the law and practice established by the case of *Harris* v. *Starkey*, 176 Mass. 445. The appellants contend that the Probate Court had no jurisdiction to make a decree which should give the estate to Skinner who was not in fact an heir of the intestate, and they cite *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87, and *Scott* v. *McNeal*, 154 U. S. 34, in which it is held that the Probate Court has no jurisdiction to appoint an administrator of the estate of a person who is in fact alive. A decree making such an appointment is absolutely void. In the present case the court had jurisdiction of the settlement of the estate of Sarah A. Ellis, and it had jurisdiction of the property to which the order of distribution relates. It was the duty of the court, after the payment of the debts and the lapse of such time as would enable it to act advisedly, to determine who was entitled to the balance of the estate and to order a distribution of it. A petition for an order of distribution is in the nature of a proceeding *in rem*, and the court unquestionably has jurisdiction in such cases. *Shores* v. *Hooper*, 153 Mass. 228, 232. *Loring* v. *Steineman*, 1 Met. 204. *Pierce* v. *Prescott*, 128 Mass. 140. If a mistake of law or fact is made in a decree of distribution the consequences are not different from those following mistakes in other judgments or decrees. A decree of distribution is a protection to an administrator who acts in good faith under it.

In the present case there is no question of the regularity of the proceedings leading up to the decree. All required notices were given and the estate was settled regularly. The revocation of the decree did not prevent the court in making the new decree from protecting the administrator in reference to his payment made in good faith under the authority of the first decree. The only other question raised that is not covered by the case of *Harris* v. *Starkey*, *ubi supra*, and the other authorities cited, is whether the administrator was guilty of negligence in connection with the making of the original order of distribution, such as should deprive him of the right to rely upon it for his protection, and should require the court to make a new decree

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as if the former decree had not been entered. See *Pierce* v. *Prescott*, *ubi supra*. We are of opinion that he was not. Of his good faith there is no question. Inquiries and investigations were made for a long time through counsel, and different special notices were given and letters sent in addition to the publications ordered by the court. We are of opinion that the administrator is entitled to the protection given him by the order, and that the last decree of the Probate Court is correct. If Skinner who received the money should acquire property, he may be compelled to refund. If he continues financially irresponsible, the petitioners will suffer from a misfortune for which the respondent is not blamable.

Decree affirmed.

LOTTA M. CRABTREE *vs.* WILLIAM A. MILLER.

Suffolk. December 4, 1906. — February 26, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Landlord and Tenant. Deed.

A lease of a hotel for ten years contained this description of the leased premises: "buildings numbered 625 to 631 inclusive on Washington Street, Boston, Mass., together with the basement under said premises, meaning thereby the entire buildings, containing stores, and all floors over said stores meaning thereby all the real estate I now own on Washington Street excepting the building known as the Park Theatre." The lessor owned the adjoining building known as the Park Theatre and owned also a covered passageway leading from Washington Street, called a court, about eighty feet long and from ten to fourteen feet wide which for about twenty years had been used as an exit from the theatre, constituting a necessary part of its exits required by the building laws of the city of Boston, and which also was used as a passageway in connection with the hotel, from which two small doors opened upon it. This court was paved with stone flagging and was arched over, and a part of the hotel was built above it. The assignee of the lease closed the court by locking a gate at its entrance and claimed the right to use it for mercantile purposes. In a suit in equity to enjoin such use, it was *held*, that the description of the leased property included only buildings and that the court was not a building, that, if the court could be treated as belonging to a building, it was excluded expressly from the lease as a part of the Park Theatre, and that at any rate the right to the continued use of the court as an appurtenance of the theatre was included in the exception of the theatre building, so that the defendant's only right in the court was to use it as a passageway appurtenant to the hotel.

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BILL IN EQUITY, filed April 28, 1903, by the owner of certain real estate on Washington Street in Boston, comprising a building formerly occupied as a part of a hotel called the Hotel Reynolds, a covered or arched way called Gibbons Court and a building known as the Park Theatre, to enjoin the defendant, who was the assignee of the lease of the plaintiff's hotel property from claiming an exclusive right in Gibbons Court or the right to use it for mercantile purposes and to compel him to leave the gate at the entrance of that court unlocked and open.

The case came on to be heard before *Braley*, J., who at the request of the parties reported it for determination by the full court, such decree to be entered as justice and equity might require.

F. Paul, for the plaintiff.

H. V. Cunningham, for the defendant.

KNOWLTON, C. J. On March 16, 1899, the plaintiff was the owner in fee of adjacent lots of land on Washington Street in Boston. These lots were occupied by buildings used as a hotel, by the Park Theatre, and by a covered passageway called Gibbons Court. Gibbons Court runs westerly from Washington Street about eighty feet, between the hotel buildings on the south and the Park Theatre on the north. It is about ten feet wide at its easterly end next Washington Street, and about fourteen feet wide at its westerly end. At the entrance from Washington Street the sidewalk is discontinued upon both sides, to permit the unobstructed passage of teams in and out. On March 16, 1899, it was paved with stone flagging, and was arched and built over by the hotel buildings at about the height of adjacent stores. It is bounded on the south by the hotel buildings, on the west and north by Park Theatre, and on the east by Washington Street.

At this date the rooms over Gibbons Court and rooms over the lobby of the theatre, and those in the Park Theatre building had long been used as a part of the hotel. Those in the theatre building were expressly excepted from the premises leased for a theatre. They included, from the first story to the roof, some four or five stories. At a considerable distance from Washington Street there was a small doorway from the hotel into Gibbons Court, and near the extreme southwest corner of the

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court there was another small doorway leading into the basement of the hotel and of the theatre.

The principal entrance to the theatre is from Washington Street through the lobby. At the westerly end of Gibbons Court there is a large exit from the auditorium of the theatre, nearly equal in width to the width of the court at that end. This is opened only at the close of a performance, or for ventilation. This exit from the theatre through Gibbons Court has been used about twenty years. At some distance from Washington Street there is a large doorway opening from the lobby of the theatre into Gibbons Court. There is no way for an audience to enter or leave the theatre other than by the lobby or Gibbons Court. In view of the building laws of the city of Boston (Sts. 1892, c. 419, § 90; 1894, c. 443, § 23) the authorities of Boston would not permit the Park Theatre to be used as a place of entertainment, if Gibbons Court should be permanently obstructed, unless some other suitable exit should be provided as a substitute. Under present conditions it is impracticable to provide such an exit.

On March 16, 1899, the plaintiff gave a lease of the hotel to Gould and Pollo for ten years from May 15, 1899, of which the defendant is the assignee and present holder. The description of the leased property is as follows: "The following described premises, namely, buildings numbered 625 to 631 inclusive on Washington Street, Boston, Mass., together with the basement under said premises, meaning thereby the entire buildings, containing stores, and all floors over said stores meaning thereby all the real estate I now own on Washington Street excepting the building known as the Park Theatre." The defendant now contends that Gibbons Court passed to him as a part of the leased premises, and he threatens to close it and use it for mercantile purposes.

The question thus presented calls for a consideration of this language in its application to the property. If we look at the entire description of the property antecedent to the explanatory part, we have only the "buildings numbered 625 to 631 inclusive." Then follows this explanation, which does not enlarge the demise, "meaning thereby the entire buildings, containing stores, and all floors over said stores." In the substantive part

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of the description, including the first explanatory clause, the lessee is given nothing but buildings. The description, of course, includes everything that is appurtenant to the buildings and necessary to their use. It includes the land underneath, so far as it is needed for their support. If there is adjacent land belonging to the lessor which is used with the buildings, the use of which is necessary to the proper occupation of them for the purposes for which they were intended, the use of such land is included as an appurtenance. *Allen* v. *Scott*, 21 Pick. 25. *Salisbury* v. *Andrews*, 19 Pick. 250. *Forbush* v. *Lombard*, 13 Met. 109. *Brown* v. *Thissell*, 6 Cush. 254. *Oliver* v. *Dickinson*, 100 Mass. 114. *Hooper* v. *Farnsworth*, 128 Mass. 487. In the present case the right to use Gibbons Court as it had been used, in connection with the doorways opening into the hotel, passed to the lessee. Nothing more can reasonably be claimed under the particular description in the lease.

The defendant relies upon the final explanatory clause, "meaning thereby all the real estate I now own on Washington Street excepting the building known as the Park Theatre." The general rule is that where real property is described by a particular and definite description, the addition of an inconsistent general description does not enlarge the grant. *Whiting* v. *Dewey*, 15 Pick. 428. *Melvin* v. *Proprietors of Locks & Canals*, 5 Met. 15. *Dana* v. *Middlesex Bank*, 10 Met. 250, 255. *Sawyer* v. *Kendall*, 10 Cush. 241. *Presbrey* v. *Presbrey*, 13 Allen, 281.

Moreover, in the present case the lessor described her real estate on Washington Street as if it consisted of buildings only. She included in the lease only certain buildings, and she described them as being all her real estate on Washington Street except a certain other building. Gibbons Court is not a building. In a strict sense it does not fall within the description of that which she leased at that time, or of that which she excepted from the lease. If, in reference to such a description as this, it is to be treated as belonging to a building and passing as a part of a building, it certainly belongs to the building known as Park Theatre rather than to the buildings used as a hotel. It was included in the part excepted. *Allen* v. *Scott*, 21 Pick. 25. For many years it has been an important and necessary appurtenance of the theatre, while its use with the hotel was of

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comparatively slight importance. We have no doubt that the continued use of this court as an appurtenance of the theatre was intended by the parties when the lease was made, and was included in the exception of the building known as the Park Theatre.

The defendant has no rights in Gibbons Court other than to use it as an appurtenance of the hotel, substantially as it was used when the lease was made, with such modifications of the use as have been authorized by the lessor in writing since the lease was executed.

Decree for the plaintiff.

GARRETT W. SCOLLARD *vs.* AMERICAN FELT COMPANY.

Suffolk. December 5, 1906. — February 26, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Constitutional Law. Tax. Corporation. Statute, Repeal. *Equity Pleading and Practice,* Service of process.

A tax lawfully may be assessed to a foreign corporation doing business in this Commonwealth upon its personal property situated here and need not be assessed *in rem* against the property itself.

The provision of St. 1903, c. 437, § 71, which makes a foreign corporation doing business in this Commonwealth subject to taxation on machinery and merchandise owned by it and situated in the Commonwealth by the city or town in which such property is situated is constitutional, and if such a tax has been assessed properly and has remained unpaid for sixty days after it was payable, the collector of taxes of the city or town where the tax was assessed can maintain a petition under St. 1902, c. 349, to restrain such foreign corporation from doing business in this Commonwealth until such tax is paid, irrespective of the question whether the portion of St. 1903, c. 437, § 71, in regard to the collection of such taxes is invalid, because that part of the statute is separable from the rest, and also irrespective of the question whether the method provided by St. 1902, c. 349, for enforcing the payment of a tax upon property of a non-resident natural person doing business in this Commonwealth is constitutional, because that provision also is separable from the rest of the statute which contains it.

In St. 1902, c. 349, providing that if a foreign corporation doing business in this Commonwealth fails to pay within sixty days a tax lawfully assessed and payable the collector of taxes of the city or town where the tax was assessed may maintain a petition to restrain the corporation from doing business in this Commonwealth until the tax is paid, the provision that service may be made by

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leaving a copy of the petition at the place where the business is carried on is reasonable and valid, and this provision for service is not repealed or superseded by anything contained in St. 1903, c. 437.

PETITION, filed in the Supreme Judicial Court on May 31, 1906, by the collector of taxes of the city of Boston against a corporation organized under the laws of the State of New Jersey and doing business in Boston, under St. 1902, c. 349, to restrain the defendant from doing business in this Commonwealth until a tax for the year 1905 of $320 assessed upon the personal property of the defendant, which the defendant had refused and omitted to pay for a period of more than sixty days after demand for its payment, should have been paid.

The respondent appeared specially, and in its answer denied that the tax mentioned in the petition ever was due or payable, and alleged that the assessors of Boston had no jurisdiction over the defendant by reason of its non-residence, that the assessment was void as in violation of art. 12 of the Declaration of Rights and of art. 5 of the Amendments to the Constitution of the United States, that there had been no legal service of process, and that the court had no jurisdiction.

The case was heard by *Hammond*, J. upon agreed facts which are stated in the opinion. The justice made a decree ordering that an injunction issue as prayed for in the petition; and the respondent appealed.

The case was submitted on briefs.

H. R. Bailey, G. N. Webster & R. C. Cumming, for the respondent.

G. A. Flynn, for the petitioner.

KNOWLTON, C. J. This petition in equity is brought against the defendant, a foreign corporation, under the St. 1902, c. 349, which is as follows: "When any foreign corporation or non-resident person doing business in the Commonwealth shall for sixty days neglect, refuse or omit to pay a tax lawfully assessed and payable, any court having jurisdiction in equity may upon petition of the collector of taxes of the city or town where the tax is assessed restrain said corporation or person from doing business in the Commonwealth until said tax, with all incidental costs and charges, shall have been paid. Service of process upon any such petition may be made by an officer duly qualified

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to serve process, by leaving a duly attested copy thereof at the place where the business is carried on." It appears by the agreed facts that the defendant had goods, wares and merchandise, and stock in trade in Boston on May 1, 1905, which the assessors undertook to tax. It is also agreed that the corporation filed no return of its taxable property with the assessors for that year. One of the assessors therefore estimated the value of its property subject to taxation. Plainly this property was rightly taxed under the St. 1903, c. 437, § 71, unless the provision in the last part of this section, that the taxes "shall be assessed, collected and paid in accordance with the provisions of chapters twelve and thirteen of the Revised Laws," is invalid.

The defendant contends that this tax could not lawfully be assessed to the defendant, but that it should have been assessed *in rem* against the particular articles of personal property to which it refers. We are of opinion that this contention is unfounded. In the first place the defendant concedes, and there is no doubt, that personal property may be separated from the domicil of the owner for purposes of taxation, and may be taxed wherever it is kept for use. *Tappan* v. *Merchants' National Bank*, 19 Wall. 490, 499. *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22, and cases cited. *Bristol* v. *Washington County*, 177 U. S. 133. Nor is there any good reason why the tax should not be assessed to the owner in such cases. It should be paid by him, as it is founded upon his ownership of the property taxed, and it undoubtedly can be collected out of the property, if that can be found within the jurisdiction. Taxes so assessed have been held valid in this Commonwealth. *Blackstone Manuf. Co.* v. *Blackstone*, 13 Gray, 488. *Boston Loan Co.* v. *Boston*, 137 Mass. 332. *Lamson Consolidated Store Service Co.* v. *Boston*, 170 Mass. 354. If the question were whether such a tax could be made the foundation of a personal judgment in an action at law against the owner, other considerations would be pertinent. See *Bristol* v. *Washington County*, 177 U. S. 133; *Dewey* v. *Des Moines*, 173 U. S. 204; *New York* v. *McLean*, 170 N. Y. 374. Whether collection could be made by such an action brought by the collector against the owner, it is unnecessary to decide; for if one part of the statute in regard to collection is invalid, we think it separable from the rest, on the

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ground that the Legislature probably would have enacted the rest without it, if the question of its validity had been considered. See *Edwards* v. *Bruorton*, 184 Mass. 529; *Commonwealth* v. *Petranich*, 183 Mass. 217; *Commonwealth* v. *Anselvich*, 186 Mass. 376, 379. Upon the facts agreed, the tax appears to have been assessed properly.

For the same reason, we think it unnecessary to consider whether this mode of enforcing the payment of a tax upon property of a non-resident person doing business in this Commonwealth is in accordance with the constitution. No question on this point has been raised by either of the parties. For the distinction between rights of corporations and rights of natural persons in these particulars, see *Paul* v. *Virginia*, 8 Wall. 168; *Pembina Consolidated Co.* v. *Pennsylvania*, 125 U. S. 181; *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305.

The remaining question relates to the service of process under this petition. The return of the officer shows that the service was made by the delivery of an attested copy of the petition and order of the court upon the vice president of the corporation, who was the person in charge of its business at the place where its business was carried on. This was in accordance with the statute. The defendant contends that the statute is unconstitutional in not requiring personal service. It should be remembered that this service is not to obtain a judgment against the corporation. It is to enforce a statute which prescribes the terms on which a corporation may do business in this Commonwealth. One of these terms is, in substance, that the corporation shall pay, within sixty days, all taxes lawfully assessed and payable, and that if it fails to pay, it may be restrained from doing business upon a petition, with a service of process by leaving an attested copy at the place where the business is carried on. Such a restraint is only until the taxes are paid, and such a service for such a purpose is reasonable. There is no doubt of the power of the Legislature to prescribe the terms on which a foreign corporation may do business within the State, and the mode of service of the processes of its courts upon it. *Boston Investment Co.* v. *Boston*, 158 Mass. 461, 463. *Attorney General* v. *Electric Storage Battery Co.* 188 Mass. 239. *Reyer* v. *Odd Fellows' Fraternal Accident Association*, 157

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Mass. 367, 373. By doing business in a foreign State, a corporation subjects itself to the statutes of that State, and impliedly agrees to be bound by them. *Lafayette Ins. Co.* v. *French*, 18 How. 404, 408. *Rothrock* v. *Dwelling-House Ins. Co.* 161 Mass. 423, 425. *Horn Silver Mining Co.* v. *New York*, 143 U. S. 305, 315. *Hartford Ins. Co.* v. *Perkins*, 125 Fed. Rep. 502, 504. The service was sufficient.

The defendant contends that this part of the statute was repealed by the St. 1903, c. 437, §§ 58, 95. The last of these sections, which specifies the chapters and sections of previous statutes that are expressly repealed, does not refer to the St. 1902, c. 349. This chapter, therefore, remains in force, unless it is inconsistent with the provisions of the later statute. It is an additional and special enactment which is found nowhere else, and which is not inconsistent with the general provisions for the collection of taxes. It provides a particular mode of service for process under the petition, that is adapted to the purpose of the petition. We are of opinion that the provision for this special kind of service remains unchanged by the later statute.

Decree affirmed.

JOSEPH E. DOUCETTE *vs.* DWIGHT BALDWIN & others, trustees.

Suffolk. December 5, 1906. — February 26, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Agency. Bankruptcy. Broker. Election. Estoppel.

If a New York stockbroker, having an office in Boston but not belonging to the Boston stock exchange, is employed by some of his customers to buy for them on margin shares of certain stocks which are dealt with only on the Boston stock exchange, they knowing this fact, and he employs a Boston broker who is a member of that exchange to buy the shares, and the last named broker buys them and carries them with money supplied to him as margins by the New York broker, who has obtained the necessary sums from his customers for the purpose although mingling the money with his own and not keeping it separate for transmission, and the New York broker does not disclose to the Boston broker that in ordering the purchases of the shares he is acting for his several customers and not for himself, the Boston broker is acting as agent of those

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customers, the undisclosed principals of the New York broker, and not as agent for that broker, and, if the New York broker is adjudicated a bankrupt, his trustee in bankruptcy as against the customers of the bankrupt is not entitled to any fund or shares of stock remaining in the hands of the Boston broker after settling these transactions.

The erroneous choice of a remedy which does not exist is not an election which precludes the prosecution of an inconsistent rightful remedy.

If a person, erroneously supposing that he has a claim against the estate of a bankrupt, proves his alleged claim in bankruptcy, this does not estop him from asserting that the whole fund and property involved in the claim belong to him and not to the trustee in bankruptcy.

BILL OF INTERPLEADER filed in the Supreme Judicial Court on January 23, 1905, by a stockbroker, who was a member of the Boston Stock Exchange, doing business under the name of Joseph E. Doucette and Company, to determine the ownership of a fund of $8,817.51, and of two hundred shares of stock of the Hidden Fortune Mining Company, and one hundred shares of the Oro Hondo Mining Company, which from time to time had been deposited in the hands of the plaintiff by Jacob Berry and Company, New York stockbrokers, as margins for an account carried by the plaintiff for Berry and Company.

The case first was heard by *Morton*, J., who made a memorandum of findings, and at a later stage was heard by *Braley*, J., who made the final decree. The facts were as follows:

Berry and Company were members of the New York Consolidated Stock Exchange, and had offices in New York, Boston and elsewhere for the transaction of their business as brokers and bankers. In their Boston office customers gave them orders to buy and carry on margin for their respective accounts various stocks which were dealt in only on the Boston Stock Exchange. Berry and Company then gave orders to Doucette to buy the Boston stocks on margin for their account. Berry and Company called for margins from such customers, and received six per cent interest on the unpaid balances for carrying the stocks. As Doucette executed the orders for Berry and Company the stocks were charged in their account, which stood in the name of H. L. Bennett, one of the partners of Berry and Company, into which from time to time various amounts were paid by check of Berry and Company. They were charged five and one half per cent interest on any balance, and the stocks were retained by Doucette as security. Specific amounts were not

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paid by Berry and Company to Doucette against each order to purchase stock corresponding with an amount paid to Berry and Company by their customer, but on the contrary there was a general running account so that specific purchases were made against their general balance. Doucette did not know, and he never was informed, for whom, if any one, Berry and Company were acting in making the various purchases and sales charged in the Bennett account, and knew only Berry and Company in these transactions, and looked only to them and their credit in their dealings. Berry and Company's customers were not informed by them of any of the relations between that firm and Doucette, although there was some evidence that two of the claimants in the course of their dealings with Berry and Company learned that Berry and Company were buying Boston stocks of Doucette.

On December 1, 1904, Berry and Company were petitioned into bankruptcy, and Doucette closed out the Bennett account with the result that there remained in his hands the fund and stocks which are the subject of the present bill. The trustees in bankruptcy of Berry and Company claimed the whole fund and stocks as successors in title to the bankrupts. Dwight Baldwin and John Collins, two customers of Berry and Company, who had margin accounts with that firm, claimed $3,773.98 and $3,541.15 respectively as the proceeds of that part of their accounts with Berry and Company which covered Boston stocks, on the theory that they were the undisclosed principals for whom Berry and Company had acted in dealing with Doucette. It appearing that there were at least seven other customers who were similarly situated, the court issued an order of notice to them to present their claims by a given date or be barred. Mrs. Frances A. Conant and Albert E. Fowler made such claims. The court found against Fowler, and allowed the claims of Mrs. Conant, Baldwin and Collins for $190.10, $3,773.98 and $3,541.15, respectively. A decree was entered accordingly; and the trustees in bankruptcy of Berry and Company appealed.

L. M. Friedman, (*P. A. Atherton* with him,) for the trustees in bankruptcy of the estate of Jacob Berry and Company.

A. Whiteside (*C. R. Lamson* with him,) for the defendants Baldwin and Collins.

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E. E. Elder, for the defendant Conant.

No counsel appeared for the plaintiff.

BRALEY, J. If the bankrupt firm acted solely as agents in the purchase of the stocks, the right of the trustees to participate in the distribution of the fund must be postponed until the demands of the several claimants are satisfied. Upon reading the evidence it appears to have been substantially uncontroverted that, not being members of the Boston Stock Exchange, the bankrupts when their customers desired to buy certain copper stocks employed a member to make the purchase. The claimants respectively gave orders to buy a certain number of shares of these stocks to be carried on a margin. In each instance upon receipt of the order to buy accompanied with the money required, without disclosing the name of the customer, the order immediately was transmitted by telephone to the plaintiff, who was a member, and by whom it was executed. Of the claimants, Baldwin and Collins knew, but Mrs. Conant and her agent were ignorant with whom the firm dealt, yet all understood that because they were not members Berry and Company were unable to buy the stocks on the floor of the exchange. When notified from time to time that further advancements had become necessary to maintain the margin, on making payments the money went into the general funds of the firm by whose check the amount due then was paid to the plaintiff. There is no evidence that books of account were kept by Berry and Company in which they entered the names of these customers with the date, price of the stock and number of shares bought by each, nor does it appear that they received any compensation for their services. Until their assignment for the benefit of creditors the plaintiff rendered monthly statements, and supposed and believed that he was dealing with them as principals. His books contained itemized accounts in the name of one of the members of the firm of the various purchases and sales, but after their failure upon notice from two of the claimants he closed the account, leaving a balance, out of which, if entitled to recover anything, it is conceded by the trustees they should be allowed their respective claims. It is from these facts that the legal relations of the parties must be ascertained. In substance the bankrupts with the knowledge of the several

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claimants, not being able to buy personally in a regular way the stocks desired, were employed to buy from other brokers, and selected the plaintiff. At no period was it contemplated that Berry and Company should become principals, and the plaintiff their agent, but they were expressly engaged to act for the claimants, by whom, as required, the money for margins was supplied, and neither the fact that commissions were not shared nor the failure to disclose their agency worked any change in the character of their original employment. The remaining amount necessary to purchase was advanced by the plaintiff who afterwards carried the stocks, and with whom, and not with the bankrupts, the claimants sustained the contractual relation of debtor and creditor. *Rice* v. *Winslow*, 180 Mass. 500, 502. While the money received before transmission was mingled with their own, so that its identity being lost specific payments could not be traced, this conversion conferred no authority to use these funds to speculate in stocks for the benefit of themselves, as they could not act legally in the double capacity of buyers and sellers. *Commonwealth* v. *Cooper*, 130 Mass. 285, 288. Instead, upon his employment, the plaintiff became the agent of the principals of the bankrupts even if undisclosed by them. *Eastern Railroad* v. *Benedict*, 5 Gray, 561, 562. *Byington* v. *Simpson*, 134 Mass. 169. If before such knowledge a settlement had been effected he would have been discharged, but upon their disclosure the money could be recovered by the principals to whom it belonged. *Barry* v. *Page*, 10 Gray, 398. *Foster* v. *Graham*, 166 Mass. 202. See *Cushman* v. *Snow*, 186 Mass. 169, 173, 174. The trustees, having succeeded only to such rights as the bankrupts had, stand no better and have failed to prove that they are entitled to the money. *King* v. *Cram*, 185 Mass. 103, 104.

By proving her claim in bankruptcy Mrs. Conant is not barred from recovering, for, if she mistakenly supposed such right existed, this is insufficient to prevent her from intervening in these proceedings for the collection of her debt. *Snow* v. *Alley*, 156 Mass. 193, 195.

The findings of fact made by the single justice are amply sustained by the evidence, and the final decree should be affirmed.

So ordered.

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DANIEL W. COX *vs.* CHRISTIAN P. ANDERSEN & another.

Suffolk. December 7, 1906. — February 26, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Sale. Words, "Sample."

Where one agrees to buy a stipulated amount of a kind of coal called "river anthracite" from a dealer who tells him that he buys this kind of coal from men who dredge it from a river and that he sells it as he buys it, and the seller exhibits to the buyer a specimen of river anthracite, saying that it may run a little better or a little worse than the specimen, and on the next day the seller writes to the buyer that he is sending by express a sample of the river anthracite coal, saying "it may run a little better, or a little worse, we take it as we get it and so ship it," and afterwards writes "the sample sent you is about an average, you may judge from it the percentage of sticks, stones, etc. in it," the sale can be found not to be a sale by sample, so that, although the coal delivered is inferior to the specimen exhibited or to that afterwards sent, if it is river anthracite and is merchantable the seller can recover the agreed price; and a statute of another State where the sale was made relating to sales by sample does not apply to the transaction.

Where a buyer has ordered merchandise which is to be shipped to him by rail, and the seller delivers the merchandise on board the cars at the shipping point consigned to the buyer as directed, the title passes and the buyer owes to the seller the price agreed upon.

BILL IN EQUITY, filed in the Superior Court on March 12, 1904, by Daniel W. Cox, of Harrisburg in the State of Pennsylvania, doing business under the name of D. W. Cox and Company, against Christian P. Andersen, doing business in Boston, and the Andersen Coal Mining Company, a corporation organized under the laws of the State of New Jersey and having a usual place of business in Boston, to reach and apply the interest of the defendant Andersen in the defendant corporation to the payment of a debt of $1,654.86 alleged to be due from the defendant Andersen to the plaintiff for coal sold and delivered.

In the Superior Court the case was referred to a master, who filed a report in favor of the plaintiff. Later the case was heard by *Fox*, J. upon the master's report and the exceptions thereto. He made a final decree overruling all the exceptions to the master's report, confirming the report, declaring that the defendant Andersen owed the plaintiff $1,654.86, with interest thereon at

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six per cent per annum from November 2, 1902, to the date of the decree, making the sum of $1,992.45, and ordering that the interest of the defendant Andersen in the defendant corporation be applied toward the payment of that debt. The defendant Andersen appealed.

The master found the following facts:

The controversy in question grew out of the anthracite coal strike of 1902. At that time the plaintiff was a wholesale dealer in anthracite and bituminous coal with a place of business and residing at or near Harrisburg, Pennsylvania. The defendant Andersen was a wholesale coal dealer with an office in Boston. Hereinafter he is called the defendant.

Owing to the stringency in the coal market and the difficulty of obtaining a sufficient supply of anthracite coal, because of the strike, the defendant sent his agent, one Ellicutt, to Pennsylvania to see what coal he could purchase there. Upon learning for the first time that there was a commodity called "river anthracite," the defendant's agent saw the plaintiff at the latter's office during the morning of September 26, 1902, and inquired if he had river anthracite coal to sell. The plaintiff replied that he then was shipping some river anthracite coal to other parties, and could not tell certainly whether he could obtain enough additional coal to supply all the defendant wanted, but thought that he could. The character of river anthracite coal and its component parts were explained to Ellicutt, and the plaintiff stated that he bought the coal from the men on the river who dredged it, and that he sold it as he bought it, and that it might run a little better or a little worse than the coal which the plaintiff had in his office, a specimen of which was shown to Ellicutt. The plaintiff also offered to show Ellicut the process of dredging coal from the river, but the latter declined on account of lack of time. Ellicutt said he would take the coal "as is, I am going to take care of it," and a tentative agreement was reached, provided the plaintiff could obtain the requisite additional amount from the dredger men at the same price he then was paying, by which the plaintiff was to sell to the defendant fifteen hundred tons of river anthracite at $2 a gross ton, four to six cars daily, delivered on the railroad cars at the shipping point near Harrisburg, consigned to C. P. Andersen at South Amboy, which is the point where the coal

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shipped by rail reached water transportation. The plaintiff had been dealing in river anthracite for only a few months previous, and this was the first time that the defendant or his agent Ellicutt had purchased river anthracite coal. The defendant's agent then reduced the agreement reached during the morning, as he understood it, into writing in the form of a letter to the plaintiff confirming their conversation, and called on the plaintiff during the afternoon of the same day, when he was informed by the plaintiff that the latter thought he could obtain the coal for the defendant, and that he would begin shipments in a short time, and it was arranged that the plaintiff should ring up the defendant's agent on the following day by telephone at Altoona, Pennsylvania, where the latter was going in search of more coal, and inform him definitely whether the plaintiff could furnish the coal.

On the following day the plaintiff wrote to the defendant in regard to the conversation with the defendant's agent on the day previous, and stated that he was sending by express a sample of the river anthracite coal and said therein "it may run a little better, or a little worse, we take it as we get it and so ship it."

On the same day, or the day following, the plaintiff telephoned to the defendant's agent and stated that he had been unable to buy the coal from the river men at the same rate that they had been furnishing it previously, and that he would be obliged to charge the defendant $2.50 per gross ton, to which change in price the defendant's agent agreed, and urged the plaintiff to push the shipments as fast as possible, and on October 2, 1902, the plaintiff wrote to the defendant stating that he could not get the river coal without paying $.50 a ton more to the dredgers, and that he had so advised Ellicutt, who had directed him to ship at the rate of $2.50, and in this letter the plaintiff said, "the sample sent you is about an average, you may judge from it the percentage of sticks, stones, etc. in it. We explained very fully to Mr. Ellicutt the character and condition of the coal, in order that there might be no misunderstanding about it, for we said to him, we don't want to ship a lot of coal to South Amboy and have trouble with it because it don't please you. He said, 'ship it as is, we will take care of it.' The sticks and shells give the coal a bad appearance, but don't hurt it of any consequence, the stones do."

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On October 4, 1902, the defendant wrote to the plaintiff acknowledging the receipt of the letter of the 2d instant, and making no objection to or repudiation of the price of $2.50 a ton, or of the statement of the conversation with the defendant's agent therein referred to.

The master found that the contract was made in Pennsylvania and was governed by the laws of that State, that it was partly an oral one and partly reduced to writing, and that as completed it was that the plaintiff should sell to the defendant fifteen hundred tons of river anthracite coal, f. o. b. cars at point of shipment, for $2.50 a gross ton, the plaintiff to ship from four to six cars daily, if he could obtain sufficient coal therefor from the dredger men, and the defendant to make weekly payments therefor, according to weekly bills and drafts rendered him by the plaintiff. The master found that there was no sale by sample, nor an agreement that the river anthracite coal to be delivered should be equal in quality to the specimen shown Ellicutt, or to that sent to the defendant, which specimens he found were shown for the purpose of conveying to those unfamiliar with the commodity called river anthracite coal a knowledge of its characteristics and component parts.

He found that river anthracite coal was a commodity known in the vicinity of Harrisburg, but little known elsewhere, and that before the coal strike of 1902 it had only a local use in the vicinity of Harrisburg, where it was used in furnaces with movable grates and strong drafts, and sometimes was mixed with bituminous coal. So far as appeared in evidence, no river anthracite had been shipped to New England until during the coal strike. River anthracite is the result of the washing of small particles of coal from the collieries on the Susquehanna River, and the coal is deposited during high water in the shallow places in the river in the vicinity of Harrisburg.

The plaintiff began shipping coal to the defendant on October 1, 1902, and during the first week shipped five hundred and forty-three and twenty-six one hundredths tons, and attached the shipping receipts to a draft on the defendant figured at the rate of $2.50 per gross ton, which draft, amounting to $1,358.15, the defendant paid, although he had not seen any of the coal shipped. No charge was made for this coal in the bill in equity.

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Between October 4 and 10, 1902, the plaintiff shipped only three cars, as owing to the heavy rains and consequent high water in the river he was unable to obtain sufficient coal from the dredger men, who were compelled to suspend operations for a time, and the master found that this failure to ship from four to six cars daily during that period was not owing to any bad faith on the part of the plaintiff. Between October 4 and October 14, 1902, the date of the last shipment, the plaintiff shipped on cars consigned to the defendant six hundred and sixty-one tons, all of which the defendant took on vessels at South Amboy except one hundred and forty-eight tons, which still remains there, the defendant failing to remove it. The defendant refused to pay for six hundred and sixty-one tons of coal consigned to him by the plaintiff and placed on the railroad cars at the shipping point, where the master found that the title to all the coal shipped passed to the defendant.

On October 16, 1902, the defendant telegraphed to the plaintiff as follows: "River coal proves unsatisfactory, make no more shipments my account," and on the same date wrote to the plaintiff stating that a cargo of the coal just discharged at Providence contained a very large quantity of stones as big as one's fist. In compliance with the defendant's telegram, the plaintiff ceased shipping any further coal to the defendant, and informed him on October 17, 1902, by letter, that he had shipped the defendant altogether twelve hundred and five tons. Considerable correspondence ensued between the plaintiff and the defendant in regard to the alleged greater number of impurities in the coal than was expected, and the plaintiff drew on the defendant for the balance of $1,654.86, which he claimed as due for the six hundred and sixty-one tons of coal already shipped. This draft was refused by the defendant on November 2, 1902.

The master found that the defendant never notified the plaintiff that he rejected any of the coal shipped. He found that the river anthracite coal as shipped by the plaintiff to the defendant was about uniform in grade and that it contained a considerably larger proportion of sand, stones and pebbles than the specimen, or so called sample, sent by the plaintiff to the defendant, and was considerably inferior to it in quality. He found that the coal shipped by the plaintiff to the defendant

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was "river anthracite" and was of a merchantable quality, although inferior in quality to the specimen sent, and that its merchantability at that time was increased by the conditions then existing in the coal market caused by the coal strike of 1902. He found that its inferior quality was not due to any bad faith on the part of the plaintiff, but was due to the beds of the river being too closely worked during periods of low water and to the probable rapacity of the dredger men.

J. E. Hannigan, for the defendant Andersen.

E. F. McClennen, for the plaintiff, was not called upon.

LORING, J. 1. We are of opinion that on the facts stated in his report the master cannot be held to be wrong in finding as a fact that the sale was not a sale by sample. The specimen shown the defendant's agent Ellicutt, on September 26, was not called a sample by the plaintiff; and, although that sent to the defendant by express on September 27 was spoken of in the plaintiff's letter as a sample, that did not prevent the master from finding that the sale made was a sale of the coal as the plaintiff received it from the dredgers, whether better or worse than the specimens. See in this connection *Weston* v. *Barnicoat*, 175 Mass. 454. For this reason the statute of Pennsylvania enacted April 13, 1887, relative to sales by sample, does not apply.

2. The master found that the coal shipped answered the description of the coal which the defendant agreed to buy and pay for. When the plaintiff delivered this coal at his own expense on board the cars at the shipping point near Harrisburg, consigned to the defendant as directed, he had done all he was required to do to entitle himself to the contract price. The title passed to the defendant, and he owed the plaintiff the price agreed upon. See *Dr. A. P. Sawyer Medicine Co.* v. *Johnson*, 178 Mass. 374.

Decree affirmed.

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BOSTON AND WORCESTER STREET RAILWAY COMPANY *vs.* HENRY H. ROSE.

Middlesex. December 7, 1906. — February 26, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Contract, Performance and breach. *Equity Jurisdiction*, Specific performance. *Equity Pleading and Practice*, Bill, Amendment, Decree.

In a suit in equity by a street railway company to compel the specific performance of a contract to convey to the plaintiff a strip of land on the proposed location of its railway, the contract sought to be enforced, giving an option to purchase the land, provided as follows: "This option may be accepted in writing by said corporation within ninety days from this date and within thirty days after such acceptance, said conveyance shall be made by warranty deed . . . whenever and wherever said corporation shall tender said agreement after seven days' notice by it of the time and place of tender." It appeared that the plaintiff accepted the option within the ninety days named but did not offer performance and demand a deed from the defendant until thirty days after the acceptance had expired, although five days after such expiration the plaintiff tendered the purchase money and a deed for execution by the defendant and then gave the defendant seven days' notice of a time and place of performance, in accordance with which the parties met and the defendant refused the plaintiff's tender of performance. *Held*, that, although the provision fixing the time within which the option might be accepted was of the essence of the contract, the provision which stated the time after the acceptance within which the deed must be delivered was not of such essence, and that the plaintiff was entitled to a decree for specific performance in spite of its failure to tender performance and demand a deed within thirty days after its acceptance of the option.

In a suit in equity by a street railway company to compel the specific performance of a contract to convey to the plaintiff a strip of land on the proposed location of its railway, where under the contract proved it was the duty of the defendant to prepare and deliver a deed, and the plaintiff was to pay a sum of money and to do certain things upon the land which could not be done until it acquired title to it, the plaintiff showed that it tendered the money and offered a deed for execution by the defendant, which did not contain a statement of all the things to be done by the plaintiff as a part of the consideration, that the defendant refused to sign this deed and never prepared or tendered a deed, that a formal notice in writing given by the plaintiff to the defendant of the time and place of performance stated that the plaintiff would be ready to receive the conveyance of the land and "to tender the consideration therefor" at the time and place named, and that the defendant at the time and place named neglected to prepare a deed, and refused to carry out his contract on grounds other than the failure of the plaintiff to include in the deed prepared by it all the agreements made by the plaintiff, and there was nothing to indicate that the plaintiff ever refused to perform those agreements when it should receive its title. *Held*, that the evidence warranted a finding that there was a sufficient offer of performance on the part of the plaintiff to enable it to maintain its bill.

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In a suit in equity by a street railway company to compel the specific performance of a contract to convey to the plaintiff a strip of land on the proposed location of its railway, a copy of a contract in writing for an option to purchase the land, accepted by the plaintiff, was annexed to the bill and made a part of it. Annexed to the answer was a copy of another instrument in writing which the defendant alleged to be a part of the contract between the parties. A master found that the two instruments were delivered at the same time and together constituted the contract of option between the parties. The bill originally contained the following averment: "The plaintiff is ready and willing and hereby offers to pay to the defendant said sum of $500 and to comply with any and all other terms of said agreement on its part to be performed." The plaintiff was allowed to amend by adding to this averment the words "and any and all terms of the paper, a copy whereof is annexed to the defendant's answer, to such extent and in such manner as the court may require." The defendant objected that the contract, which was made up of the two papers, was not set forth in the bill fully and formally. *Held*, that, while it would have been more regular, in making the amendment, to include the contents of the additional paper with the formal statement of the other part of the contract, the reference to the paper annexed to the defendant's answer and the offer to perform the contract according to its terms should be treated as an embodiment of the contents of the paper in the contract set forth in the bill, and that the bill as amended contained a sufficient statement to protect the rights of the parties.

In a suit in equity by a street railway company to compel the specific performance of a contract to convey to the plaintiff a strip of land on the proposed location of its railway, where under the contract proved it was the duty of the defendant to prepare and deliver a deed and the plaintiff was to pay a sum of money and to do certain things upon the land which could not be done until it acquired title to it, and where there was no requirement in the contract that the performance of the plaintiff's agreements should be made conditions subsequent in the deed, the court in ordering a conveyance of the land were of opinion that the rights of the defendant could be secured properly by inserting in the deed agreements which would be binding on the grantee and its successors and assigns, instead of by inserting conditions, the breach of which at any time would work a forfeiture.

BILL IN EQUITY, filed in the Superior Court on September 14, 1904, to compel the specific performance of a contract to convey to the plaintiff a narrow strip of land in the town of Natick with an easement in adjoining land.

The plaintiff was allowed to amend its bill by adding the words quoted below. In allowing the amendment the judge imposed the condition, that, if it should be determined that the bill was not maintainable without the amendment, the plaintiff was to take no costs to the date of the amendment and was to pay the defendant's costs to that date.

Annexed to the bill was a copy of a contract in writing under seal marked Exhibit A which was the contract sought to be enforced. Annexed to the answer was a copy of another in-

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strument in writing which was marked Exhibit 1, signed in behalf of the plaintiff and by the wife of the defendant, which was alleged to be a part of the contract between the parties.

The seventh paragraph of the bill originally was as follows: "7. The plaintiff is ready and willing and hereby offers to pay to the defendant said sum of $500 and to comply with any and all other terms of said agreement on its part to be performed."

The amendment to the bill above referred to was by adding to the seventh paragraph the words "and any and all terms of the paper, a copy whereof is annexed to the defendant's answer, marked Exhibit 1, to such extent and in such manner as the court may require."

Exhibit A was as follows:

"Know all men by these presents, That I, Henry H. Rose of Natick in the County of Middlesex and Commonwealth of Massachusetts, in consideration of one dollar and other valuable considerations to me paid by the Boston and Worcester Street Railway Company, a corporation organized under the laws of said Commonwealth, the receipt whereof is hereby acknowledged, do hereby, for myself and my heirs, executors and administrators agree with said Boston and Worcester Street Railway Company to sell and convey to said Boston and Worcester Street Railway Company the property hereinafter described upon the following consideration: The payment of five hundred dollars, the erection and maintenance of cement tank and pipes and outlet for the restoration of spring, the erection and maintenance of Page woven wire fence on westerly boundary, the erection and maintenance of stopping point as designated by grantor.

"This option may be accepted in writing by said corporation within ninety (90) days from this date and within thirty (30) days after such acceptance, said conveyance shall be made by warranty deed with full covenants and dower release, if necessary, conveying a clear title free from all encumbrances, whenever and wherever said corporation shall tender said agreement after seven (7) days' notice by it of the time and place of tender.

"The property to be conveyed consists of a parcel of land situated on the south side of Worcester Street in said Natick

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shown on plan of Edwin H. Rogers, dated June 25, 1903, revised March 24, 1904, entitled 'Boston & Worcester Street Railway Company, Natick, Mass., Proposed Location of Natick Branch Line across Land of the Waban Rose Conservatories,' and bounded and described as follows: . . . [Description.]

"Containing about one and fifteen one-hundredths (1.15) acres.

"Together with the right to slope and bank the cut and fill on my land adjoining the granted premises to such extent as may be necessary or convenient for the construction and operation of a street railway on the granted premises and the right forever to maintain said cut and fill as so sloped and banked.

"In case of failure to make conveyance as above agreed said Boston and Worcester Street Railway Company may enforce this agreement or recover damages for its breach.

"In witness whereof I, said Henry H. Rose, hereto set my hand and seal this twenty-sixth day of April, 1904.

"Henry H. Rose. (Seal.)

"Witness.

"Bertram D. Sumner."

"Accepted this twenty-fifth day of July, 1904.

"Boston and Worcester Street Ry. Co.

"By William M. Butler, President."

Exhibit 1 was as follows:

"Natick, April 30, 1904.

"Know all men by these presents, that I, Henry H. Rose of Natick, County of Middlesex and Commonwealth of Massachusetts, in consideration of five hundred dollars and other valuable considerations to be paid by the Boston and Worcester Street Railway Company, a corporation organized under the laws of said Commonwealth, the receipt whereof is hereby acknowledged do hereby for myself and my heirs, executors and administrators agree with said Boston and Worcester Street Railway Company to sell and convey to said Boston and Worcester Railway Company the property hereinafter described, upon the following considerations:

"Namely that a cement tank or such as I shall specify be constructed on my land at the nearest suitable place from the spring, and the water conveyed from the spring to it in pipes and an

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outlet pipe, if necessary, to carry the water from it; the pipes on street railway land, to be maintained forever, all water flowing from said spring to belong to me.

"That a temporary fence be built on the east side of my pasture and maintained during the construction of said road, sufficient to keep my cows in pasture.

"That on the completion of said road a Page woven wire fence shall be built on my land as near the said road as practical to be maintained forever.

"That the gravel pit that was used to take out gravel during the construction of the main line, shall be filled in and levelled off and loam that was taken from it be spread on top and sown down with grass seed to my satisfaction, during the coming summer.

"That a white post be maintained at Walnut Street and cars stop to let off and take on passengers same as now.

"That there shall be a stopping place to take on and let off passengers on the Branch Road opposite my land at such place as I shall specify.

"That culverts be built over brook where said Road crosses it, satisfactory to me.

"That the trees necessary to be cut to build said road, be cut in such lengths as I shall specify and placed on my land to be used by me.

"The above named specifications are hereby agreed to, on the condition that said Rose delivers to the Boston and Worcester Street Railway Company a proper warranty deed of land as described.

"Natick, April 30th, 1904.

"Boston and Worcester St. Ry. Co.

"By Bertram D. Sumner, Agent.

"Lydia A. Rose."

The case was referred to S. K. Hamilton, Esquire, as master. His report contained the following findings:

"I find that the two papers, one dated April 26, 1904, and the other dated April 30, 1904, were delivered at the same time and together constitute the option which the defendant gave the plaintiff, and which entitled the plaintiff to a proper warranty deed of the property described therein upon the performance of

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the conditions therein named, or in some form by which the rights of the defendant should be protected.

"I find that this option was accepted on the 25th day of July, A. D. 1904, and became operative as a contract at that time. The option further provided that a conveyance of said premises should be made within thirty days after such acceptance by warranty deed, with full covenants and dower release, if necessary, conveying a clear title free from all incumbrances whenever and wherever said corporation should tender the consideration named in said option after seven days' notice by it of the time and place for tender.

"I find that the plaintiff did not tender said consideration nor give the defendant any notice of the time and place for tender within the thirty days named.

"I find that on the 29th day of August, A. D., 1904, the plaintiff tendered the defendant the sum of five hundred dollars ($500.00), together with a deed for his signature. This the defendant declined to sign, it not being in accordance with the option. Thereafter, on August 29, 1904, the plaintiff notified the defendant that it would be ready to receive the conveyance of the land described in said option and to tender the consideration therefor at the registry of deeds in Cambridge, on Tuesday, September 6, 1904, at ten o'clock A. M. The parties met in accordance with said appointment and the plaintiff again tendered to defendant the sum of five hundred dollars ($500.00) and a deed similar to the one tendered August 29th. This tender was declined in writing at the time of the tender.

"I find that it was the duty of the plaintiff to give the defendant seven days' notice of the time and place within the said thirty days when and where it would tender the defendant the consideration set forth in said option, and that it was the duty of the defendant to prepare and execute a deed in accordance with said option ready for delivery upon the proper tender. Neither did what was incumbent upon him. The defendant contends and asks me to find that time was of the essence of the contract. I do not consider it necessary in making my findings to determine that question, but I do find that both parties have so conducted themselves that they have waived the performance of the contract within the thirty days named.

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"I find that the consideration named in the option was such that it could not be performed in full until the plaintiff had obtained at least a conditional title to the premises described in the option. I find that on the 6th day of September, A. D. 1904, at the registry of deeds in Cambridge, upon service of a notice therefor, the parties met and then and there the plaintiff tendered to the defendant such portion of the consideration as it was possible for it to tender at that time, to wit, five hundred dollars ($500.00), and that the defendant did not tender a deed such as was set out in the option, or one which would under the circumstances protect his interests. I find that the said five hundred (500) dollars was enclosed in an envelope and remained in the hands of the plaintiff corporation ready for payment until the beginning of this suit, when the same was deposited in the International Trust Company to the credit of the plaintiff corporation.

"I find that the plaintiff is entitled to have a conveyance of the premises described in the option in such form as the court may determine will protect the defendant's interests and secure the performance of the remainder of the consideration set forth in said option upon the payment to the defendant of five hundred (500) dollars."

In the Superior Court the case was heard by *Lawton*, J. upon the master's report and the defendant's exceptions thereto. The judge made a final decree overruling the exceptions to the master's report and ordering a specific performance of the contract in the manner and upon the conditions set forth in the decree. The defendant appealed. The plaintiff also appealed.

W. R. Bigelow, for the defendant.

F. L. Norton, for the plaintiff.

KNOWLTON, C. J. The master has found that the two papers, one dated April 26, 1904, and signed by the defendant, and the other dated April 30, 1904, and signed by the plaintiff's agent, "were delivered at the same time and together constitute the option which the defendant gave the plaintiff, and which entitled the plaintiff to a proper warranty deed of the property described therein upon the performance of the conditions therein named, or in some form by which the rights of the defendant should be protected." The option was accepted in writing on July 25, 1904, and became operative as a contract at that time.

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There is no ground for the contention that it was void for want of mutuality, for it became enforceable by either party upon its acceptance within the time specified. *Mansfield* v. *Hodgdon*, 147 Mass. 304. *O'Brien* v. *Boland*, 166 Mass. 481. *Putnam* v. *Grace*, 161 Mass. 237.

In that part of the writing which fixed the time within which the option might be accepted, time was of the essence of the contract. In that part which stated a time after the acceptance within which the deed should be delivered, the contract is within the ordinary rule that time is not of the essence of the contract, unless it is made material by express stipulation, or unless there are circumstances indicating that it was deemed important by the parties and was intended to be made the subject of a stipulation to be performed literally, or unless there is such a change of conditions after the time fixed for performance, that the enforcement of the contract would be inequitable. *Barnard* v. *Lee*, 97 Mass. 92, and cases cited. *Carter* v. *Phillips*, 144 Mass. 100. *Cheney* v. *Libby*, 134 U. S. 68, 77. The defence founded on the failure of the plaintiff to tender performance and demand a deed until five days after the expiration of the thirty days from the acceptance of the option is not established.

The next objection of the defendant rests upon the contention that the plaintiff's offer of performance was not sufficient. By the terms of the contract, it was the duty of the defendant to prepare and deliver a deed. There is no dispute that the plaintiff repeatedly tendered the money, which was the substantial part of the consideration for the conveyance, and that the defendant never prepared or tendered a deed. The plaintiff tendered a deed, to be signed by the defendant, which did not contain a statement of all the things to be done by the plaintiff as a part of the consideration. As to most of these things, it is to be noticed that they could not be performed until after the land had been conveyed. The writing signed by the plaintiff's agent, which states these things, ends with the sentence, "The above named specifications are hereby agreed to, on the condition that said Rose delivers to the Boston and Worcester Street Railway Company a proper warranty deed of land as described." The plaintiff's formal notice, after the defendant's neglect to prepare a deed and the refusal to sign the deed prepared by the plaintiff,

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was that "said company will be ready to receive the conveyance of the land described in said option and to tender the consideration therefor," at the time and place fixed. After this notice the defendant, at this time and place, neglected to prepare the deed and refused to carry out his contract, on grounds other than the failure of the plaintiff to include, in the deed prepared by it, all the agreements made by the plaintiff in the acceptance of the option. There is nothing to indicate that the plaintiff ever refused to perform these agreements when it should receive its title, without which they could not be performed. We are of opinion that, in view of the defendant's conduct, the master was right in his finding that there was a sufficient offer on the part of the plaintiff to enable it to maintain the bill.

It is contended that the bill, as amended by including a statement of the plaintiff's readiness and willingness and offer to comply with all the terms of the paper prepared by the defendant's wife, and signed by its agent, as well as the terms of the other paper which formally constituted the option, is insufficient. The objection is that the contract, which was made up of two papers, was not given fully and formally in the stating part of the bill. The paper expressly referred to in the stating part of the bill was the principal part of the contract. The second paper, prepared by the defendant's wife, was informal, and it contained the most important of the things to be done by the plaintiff, stated in the other writing in different language, and it included certain others. While it would have been more regular, in making the amendment, to include the contents of the additional paper with the formal statement of the other part of the contract, we think the reference to the paper, a copy of which is annexed to the defendant's answer, and the offer to perform the contract according to its terms, should be treated as an embodiment of it in the contract on which the bill was brought, and as a sufficient statement to protect the rights of the parties.

According to the terms prescribed by the judge when the amendment was allowed, the plaintiff is to take no costs up to the date of the amendment, and it is to pay the defendant's costs to that date. The record does not enable us to determine whether there is any error in the decree as to the allowance of costs. The exceptions to the master's report were rightly overruled.

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Inasmuch as the option states that the "conveyance shall be made by a warranty deed with full covenants and dower release, if necessary, conveying a clear title free from all encumbrances," and inasmuch as there is no suggestion that the construction of the cement tank and the maintenance of it and of the pipes forever, and the construction and maintenance of the Page woven wire fence are to be secured by making them conditions subsequent in the deed, we are of opinion that the rights of the defendant in this particular can be properly secured by inserting agreements in the deed, to be binding on the grantee and its successors and assigns, instead of by conditions, the breach of which at any time would work a forfeiture. The decree should be modified accordingly.

Decree for the plaintiff.

COMMONWEALTH *vs.* JOSEPH KIRSHEN.

Suffolk. January 14, 1907. — February 26, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Lord's Day. Words, "Open."

It is no defence to a complaint under R. L. c. 98, § 2, for keeping open a workhouse on the Lord's Day, that the defendant conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day.

One is guilty of keeping open his workhouse on the Lord's Day within the meaning of R. L. c. 98, § 2, if on that day his workhouse is opened to admit workmen who enter and work during the day and is opened again at the close of their work to allow them to leave, although the public are excluded and between the times of opening the doors are kept locked.

MORTON, J. This is a complaint for keeping open a workhouse on the Lord's Day for the purpose of doing business therein. The case was submitted to the jury on agreed facts and a verdict of guilty was returned by direction of the judge. The defendant excepted to the ruling thus made, and to the refusal of the judge to rule as requested that he could not be convicted on the agreed facts. The case comes here on report. If, on the agreed facts, the defendant is guilty the verdict is to

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stand, otherwise the verdict is to be set aside and judgment entered for the defendant.

The fact that the defendant "conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day," is not a defence in a case like this. *Commonwealth* v. *Starr*, 144 Mass. 359. *Commonwealth* v. *Has*, 122 Mass. 40. It is plain on the agreed facts that he was doing business in a workshop as charged in the complaint. The defendant contends however, that he did not keep the workhouse open within the meaning of the statute. He opened the workshop to allow those who desired to do so to go in and work, and nine men and one woman out of the nine men and twelve women regularly employed went in and worked during the day, and at the close of their work he opened the workshop again to allow them to leave. In the interval all of the doors, including the one by which these persons entered and left, were kept locked, and no other person was allowed to enter the room. A shop, warehouse or workhouse may be kept open so as to come within the prohibition of the statute without being kept "wide open," or kept open in the same manner and for the same purposes in which and for which it is kept open for business on week days. In the present case, though the workshop was closed to the public, it was kept open so far as to allow such of the defendant's employees as chose to enter and work therein. As to them the workshop was kept open for business though locked against all others. The defendant would not be liable for performing secular business and labor on the Lord's Day if he disturbed no other person thereby, and conscientiously believed that the seventh day ought to be observed as the Sabbath, and actually refrained from secular labor and business on that day. R. L. c. 98, § 4. But the complaint in this case is not for doing that, but for keeping open his workshop for business, and the provisions of § 4 do not apply. *Commonwealth* v. *Has*, 122 Mass. 40.

Verdict to stand.

The case was submitted on briefs.

W. H. H. Emmons, for the defendant.

J. S. Richardson, Assistant District Attorney, for the Commonwealth.

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COMMONWEALTH *vs.* MATTHEW F. KILLION.

Suffolk. January 14, 1907. — February 26, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Evidence, Admissions and confessions, Corroboration. *Practice, Criminal. Bribery.*

Semble, that in this Commonwealth a person may be convicted of a crime upon his extra-judicial confession freely and voluntarily made, without corroborative evidence, and that such a case should be submitted to the jury for them to determine from all the circumstances, including the nature of the offence, how much if any weight shall be given to the confession.

In the trial of an indictment for having accepted a bribe from a certain person while serving on a jury in a will case, the evidence principally relied on by the Commonwealth was of confessions made by the defendant, the fair import of which could have been found to be that a bribe was given to the defendant for the purpose of inducing him to vote for rendering a verdict against the validity of the will. There was independent evidence tending to show that the defendant was a juror in the will case, that the person from whom the defendant confessed that he received the bribe had been employed in the case on behalf of the contestants to look up witnesses and jurors and to assist otherwise in the preparation of the case, and that the verdict was in favor of the contestants so that the defendant must have voted as he confessed to having been bribed to vote. *Held*, that there was corroborative evidence in support of the confessions of the defendant, which, although in itself wholly insufficient to support a conviction, tended to confirm the truth of what the defendant had said.

MORTON, J. The defendant was indicted for having accepted a bribe of $300 from one William J. Hartnett, while serving as a juror at the trial of the Crocker will case in the Supreme Judicial Court in April, 1904. There was a verdict of guilty. The evidence principally relied on by the Commonwealth was that of confessions of the defendant. The defendant contended that he could not be convicted on his extra-judicial confessions unless there was evidence *aliunde* of the alleged crime; and he further contended that the Commonwealth had offered no such corroborative evidence, and asked the judge to direct a verdict for him and to instruct the jury in accordance with his contention. The judge declined to make the ruling and give the instructions requested and the defendant excepted. The case was submitted to the jury under instructions not otherwise objected to.

The question whether extra-judicial confessions uncorrobo-

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rated by other evidence of the alleged crime will warrant a conviction does not seem to have been expressly decided in this State. In the three cases relied on by the Commonwealth, *Commonwealth* v. *Tarr*, 4 Allen, 315, *Commonwealth* v. *McCann*, 97 Mass. 580, and *Commonwealth* v. *Morrissey*, 175 Mass. 264, there was corroborative evidence, and the court did not find it necessary to decide whether a conviction could be had upon an uncorroborated confession. In *Commonwealth* v. *Howe*, 9 Gray, 110, and *Commonwealth* v. *Smith*, 119 Mass. 305, also referred to in the brief of the Commonwealth, there was independent evidence, and in *Commonwealth* v. *Bond*, 170 Mass. 41, the point whether a conviction could be had upon an uncorroborated confession was not raised. In *Commonwealth* v. *Sanborn*, 116 Mass. 61, the judge refused to instruct the jury as requested that no substantial reliance could be placed upon the verbal admissions of the defendant uncorroborated, but instructed them that whether substantial reliance could be placed upon such testimony depended upon the circumstances of each case, and that it was for them to say how far they could rely upon it. It was held that these instructions were correct and sufficient. This case would seem to go far towards settling the question in this Commonwealth. In England it has been said that such testimony warrants a conviction (3 Russ. Crimes, (9th Am. ed.) 366, 2 Hawk. P. C. c. 46, § 37, and see *United States* v. *Williams*, 1 Cliff. 5, 25), though doubts have been expressed whether the cases relied on justify such a conclusion. 3 Wigmore, Ev. §§ 2070 *et seq.* 6 Am. & Eng. Encyc. of Law, (2d ed.) 582. 1 Greenl. Ev. § 217. In *Rex* v. *Tuffs*, 5 C. & P. 167, where the defendant was indicted for stealing two heifers and the only evidence was his statement that he had driven away two heifers from his uncle's premises, "the World's End Dolver," (Dolver meaning a fen,) and the heifers were not missed, Lord Lyndhurst told the jury that there was no evidence of a stealing of the heifers, though if it had been proved that the farm was the only "World's End Dolver" it would have been sufficient, showing, if corroborative evidence is needed, how slight it may be. In this country the great weight of authority is against the sufficiency of an uncorroborated extra-judicial confession to warrant a conviction. See 3 Wigmore, Ev. § 2070, and 6 Am. & Eng. Encyc. of Law,

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(2d ed.) 582, for a collection of cases. In some of the States there is a statute providing that a confession shall not be sufficient to warrant a conviction without additional proof that the crime charged has been committed. *People* v. *Jaehne*, 103 N. Y. 182, 199. 6 Am. & Eng. Encyc. of Law, (2d ed.) 582, n. 1. But independently of statutory provisions the great weight of authority is, as has been said, against the sufficiency of a confession uncorroborated by other proof of the crime to warrant a conviction. The grounds on which the rule rests are the hasty and unguarded character which confessions often have, the temptation which, for one reason or another, a party may have to say that which he thinks it most for his interest to say, whether true or false, the liability which there is to misconstrue or report inaccurately what has been said, the danger of a conviction when no crime may have been committed, the difficulty of disproving what may be said and the feeling expressed by Mr. Greenleaf, (1 Greenl. Ev. § 217,) that the rule "best accords with the humanity of the criminal code, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases." But confessions and admissions when freely and voluntarily made have ever been regarded as amongst the most effectual proofs that can be furnished. There is no greater liability to misconstrue or misreport what has been said in a case where a person is accused of a crime, than in many other cases where one person undertakes and is allowed to repeat what another has said. And so far as the danger of conviction for a crime that may not have been committed is concerned, it is to be observed that innocent persons do not confess to crimes which they have not committed, and no one knows so well as the guilty party whether he has committed the crime of which he is accused. It is no doubt true that persons may be induced by fear or the hope of favor or other motives to make confessions which they otherwise would not have made. But confessions so obtained are rigorously excluded. In order for an extra-judicial confession to be admissible against the party making it, it must have been freely and voluntarily made. When so made it should stand like any other declaration made by a party to the cause, leaving the jury to judge from all the circumstances including the nature of the offence how much if

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any weight shall be given to it. In the somewhat analogous case of the admission of the evidence of accomplices no corroboration is required as matter of law (*Commonwealth* v. *Bishop*, 165 Mass. 148) in order to warrant the jury in convicting upon it, though such testimony is liable to be as untrustworthy, to say the least, as evidence of an alleged confession.

Whether the corroborative evidence should relate to the *corpus delicti* itself, or is sufficient, as in the case of the testimony of an accomplice, if confirmatory of some fact in the alleged confession material to the issue (*Commonwealth* v. *Bosworth*, 22 Pick. 397), we think that in the present case the alleged confessions were not wholly uncorroborated. The fair import of the confessions was, or could have been found to be, that the bribe was given for the purpose of having the defendant render a verdict against the validity of the will; and there was independent evidence tending to show that the defendant was a juror in the case, that Hartnett had been employed on behalf of the contestants to look up witnesses and jurors and to assist otherwise in the preparation of the case, that the verdict was against the will and in favor of the contestants, and that the defendant must therefore have voted as he confessed to having been bribed to vote. This testimony tended to confirm the truth of what the defendant had said though wholly insufficient of itself to warrant a conviction.

The instructions were, as the court said of those in *Commonwealth* v. *Sanborn*, *ubi supra*, "correct and sufficient," and the result is that the exceptions must be overruled.

So ordered.

W. H. Dietzman, (*W. C. Maguire* with him,) for the defendant.

M. J. Dwyer, Assistant District Attorney, for the Commonwealth, submitted a brief.

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LIZZIE A. HAYES, executrix, *vs.* JOHN B. MOULTON & others.

Worcester. January 21, 1907. — February 26, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Will, Undue influence and fraud. *Practice, Civil*, Conduct of trial, Exceptions.

The fact, that the provisions of a will are different from the previously expressed purpose of the testator or from what such provisions would have been if the testator, besides being in the full possession of his faculties, had acted under independent advice, does not require that the will should be set aside. A testator has a right to change his mind and to select his own advisers.

It is proper for a presiding judge to refuse a request for an instruction to the jury which assumes the truth of facts in dispute.

It is proper for a presiding judge to refuse a request for an instruction to the jury which, by asking him to emphasize in his charge certain portions of the evidence, attempts to put into his mouth an argument for the contention of the party making the request.

At a trial of the usual issues as to the validity of a will the contestants asked the judge to instruct the jury as follows: "If it is shown that at the time of the execution of the will the testatrix' mind was enfeebled by age and disease, even though not to the extent producing mental unsoundness, and the testatrix acted without independent and disinterested advice, and in the presence of the beneficiary under her will, and such gift was of the whole or a large portion of the testatrix' estate, and operated wholly or substantially to deprive those having a natural claim upon her bounty of all benefit in her estate, these circumstances authorize the jury to find the will void through undue influence without proof of specific acts and conduct on the part of the party charged with exerting undue influence." The judge in his charge to the jury made it plain to them that they might infer undue influence from the facts mentioned in this request if they found these facts to be proved and chose to draw such an inference. *Held*, that this was as far as it was the duty of the judge to go.

A person may have sufficient capacity to make a will if let alone and yet not be of sufficient capacity to resist the pressure upon him of strong influence, and the question whether the use of such influence is lawful often may depend upon the condition of mind and body of the person upon whom it is exercised; but this does not make it improper for a presiding judge to refuse to instruct the jury that "the question of undue influence and mental incapacity cannot be separated where the testatrix was of advanced age and suffering from a disease affecting her brain and vital powers."

Under R. L. c. 173, § 80, a presiding judge has no right to tell the jury that the testimony of a witness is open to the gravest doubt.

At a trial of the usual issues as to the validity of a will, which left all the property of the testatrix to a niece who had lived with her during her last illness, the contestants, who were the excluded nephews and nieces of the testatrix, asked the judge to instruct the jury that the fact that the favored niece stood in a relation of trust and confidence to the testatrix, who asked her advice, which the

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niece gave to her own advantage and to the injury of all other relatives, would warrant the jury in disallowing the will. The judge refused the request. *Held*, that the refusal was right; that it was a question for the jury to determine whether and how far there was a relation of trust and confidence between the favored niece and the testatrix, that, if the jury found this fact to be as contended by the contestants, it would be a material circumstance for them to consider and they would be warranted in saying that the will should not be sustained without proof to their entire satisfaction that it expressed the real intention of the deceased, which was not the instruction requested.

On exceptions merely to the refusal by a presiding judge of requests for instructions, if the requests were refused properly, it is not open to the excepting party to argue that the instructions given by the judge might be taken in a broader sense than is consistent with the law.

APPEAL by Lizzie A. Hayes, named as executrix, from a decree of the Probate Court for the county of Worcester refusing to allow for probate an instrument purporting to be the last will of Susan H. West.

A single justice of this court sent the case to the Superior Court for trial upon the following issues:

1. Was the instrument purporting to be the last will of Susan H. West duly executed according to law?

2. Was Susan H. West of sound and disposing mind and memory at the time of the execution of the alleged will?

3. Was the alleged will procured to be made through the fraud or undue influence of Lizzie A. Hayes?

The issues were tried before *Aiken*, C. J. By the alleged will all the property of the testatrix was left to Lizzie A. Hayes, who also was made sole executrix.

It appeared that at the time of the execution of the alleged will, which occurred on June 28, 1904, Susan H. West was seventy-seven years of age and was then in the last stages of chronic Bright's disease, from which she died within a month thereafter, on July 26, 1904. She was the widow of Henry D. West, who died in 1899, and who had been for many years a practising physician in Southbridge. They had had three children, two of whom died in infancy and the third died in 1882, at the age of thirteen years.

Since the death of her husband, Mrs. West had lived alone on the premises which she and her husband had occupied for many years. She was the last of a family of ten children, of whom eight left children surviving her, some of whom resided near

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her and most of whom lived within this Commonwealth. She was on good terms with her nephews and nieces, with possibly one exception, a nephew of whom it did not appear that she had heard for several years. She always was interested in seeing or hearing from them and corresponded with several of them more or less regularly down to the time of her last sickness in May, 1904, and she was well aware that most of them were in very ordinary and some of them in poor financial circumstances.

Some time before her husband's decease she and her husband had made mutual wills, and several witnesses, who testified for the respondents, said that after her husband's death Mrs. West had stated repeatedly to several of her neighbors and friends, down to within a few months of her last sickness, that she never should make another will; that she had no favorites among her nephews and nieces; that she would not leave all her property to any one of her relatives and that she thought all of them should share in it. Her estate consisted of the property which she took under the will of her husband, comprising the dwelling house and lot which they had occupied, unincumbered, and valued at about $8,000, and cash on deposit in various savings banks, amounting at the time of her death to about $3,000, making the total value of her real and personal estate between eleven and twelve thousand dollars.

During the progress of the disease from which she finally died, she gradually failed and during the last two years of her life she complained at various times of headache, dizziness and pains on her left side, and on at least two occasions during these dizzy terms she had fallen wherever she happened to be. About the middle of May, 1904, she had a severe attack in the form of a stomach trouble, and she was so far unable to get about or care for herself that some of her neighbors brought in a part of her meals and urged upon her the necessity of having some one with her to care for her. For a while she had a young girl to take care of her, and then sent for her niece Lizzie A. Hayes.

Mrs. Hayes, in her own behalf, testified, that she was fifty-seven years old; that she lived with Mr. and Mrs. West for about five years from the time she was twelve years old; that her aunt was a peculiar woman; that she could not have lived with her and have been very happy; and that she never saw anybody

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that went there that got along very well with her. She further testified that she was a milliner by trade and had conducted her business very successfully for twelve or fourteen years before her marriage with her present husband, who was a retired business man, and that they both were very comfortably situated financially, which facts were well known to Mrs. West.

There was evidence introduced by the respondents that Mrs. West had on one or more occasions previous to her last sickness said that Lizzie, meaning Mrs. Hayes, did not need any of her, Mrs. West's, property, as she was well off, and that she, Mrs. West, did not like the way Mrs. Hayes had treated her father about the property which he had put into Mrs. Hayes's hands in not returning it to him when he wanted it.

Mrs. Hayes testified that within half an hour after her arrival in Southbridge, on June 14, Mrs. West said to her, "I don't know how this," meaning her sickness, "may turn with me. I have sent for you to have you fix up my business. I haven't done anything about making a will." To which Mrs. Hayes replied, "All right, I am ready at any time to assist you." The second conversation they had with reference to the matter was three or four days afterwards, when Mrs. West said to her, "I can't quite decide. I have thought I would give something to the dumb animal society and I have also thought of giving some to an old ladies' home. What would you do if it was you?" To which Mrs. Hayes testified that she replied: "If I was situated as you are, with no children and no husband, I should divide it up equally between my nieces and nephews that I thought the most of." To which she testified Mrs. West replied, "That is just what I don't want to do; I don't want to have the property sold." Their third conversation regarding the matter occurred on June 27, the day before the alleged will was signed. Mrs. Hayes testified that Mrs. West then said, "Well, time is flying and I must do something and straighten out this business. I must decide how to do it. I don't know how to do it. I would like to give this property to some one who would keep it. I don't want to have it sold"; that she, Mrs. Hayes, waited a few minutes and then said to Mrs. West, "Well, Aunt, if you wish me to have this, I will keep it just as it is and rent it." About an hour afterwards, Mrs. West said, "I am in favor of giving this

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property to you." To which Mrs. Hayes testified she replied, "All right, I am ready at any time to fix it up as you wish." Mrs. West then said, "Well, I would like to have you go and get Uncle Henry's will," that is, the will of her husband. Mrs. Hayes testified that when she found the will and read it to Mrs. West, the latter said, "I would like to have you make a will just like that, with the exception, I would like to have you mention to each of the nieces and nephews a dollar."

Mrs. Hayes testified that she had known for some time that her aunt had some funds on deposit, but the exact amount she did not know, and that she had other personal property and effects besides the real estate, and she also testified that she understood her aunt to mean only the real estate when she used the words "this property," in speaking of what she intended to give her. Mrs. Hayes further testified that she went directly into an adjoining room and drafted a will for Mrs. West, making it an exact copy of her uncle Henry's, Henry D. West's, will, except as to the names and the bequest of a dollar to each of the nephews and nieces, as above mentioned, as requested by her aunt. She testified that she then took it and read it to her aunt, who said, "Now, I would like to have it taken to Mr. Hyde and if it is all right, I would like to have it typewritten."

Mrs. Hayes further testified that at none of these interviews with her aunt with reference to the will or the disposition of her property was any other person present, that although she knew that her aunt was at first inclined to give some of her property to the dumb animal society or the old ladies' home, and did not wish to have the real estate sold, she, Mrs. Hayes, never suggested to her aunt the propriety or advisability of having any independent or disinterested advice as to how her aunt's desires in these respects might be carried out, and she testified that the reason why she had drawn a will in her own favor, including all of Mrs. West's property, both real and personal, when Mrs. West had simply meant to give her this property, meaning real estate, was because her uncle's will, which she said Mrs. West wanted her to copy, as above stated, expressed it that way.

It further appeared that on the following morning, June 28, Mrs. Hayes took the draft of Mrs. West's will, which she herself had written, to the office of Mr. Hyde, who was not a lawyer

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but in the real estate and probate business, and she testified that she told Mr. Hyde that Mrs. West desired to make her will and handed him the draft she had made, telling him, if it was lawful and right, to draw it that way. Upon this point Mr. Hyde, who was called as a witness for the petitioner, testified that what Mrs. Hayes said to him was, that her aunt, Mrs. West, desired him to write the will for her and that she, Mrs. Hayes, gave him a written memorandum, indicating what was desired for this will. He further testified that the draft which Mrs. Hayes presented to him was in form and effect a will unexecuted, excepting the *in testimonium* clause, which he thought was omitted, and that the wording of the will written out by him which Mrs. West signed was identical with the draft presented to him by Mrs. Hayes, excepting the clause beginning "in making the foregoing disposal of my estate, I am not forgetting," etc., which he substituted in place of the bequest to the various heirs by name and that he added an *in testimonium* clause. He further testified that in all other respects, so far as he could recall, there was no difference in the wording of the two. Mrs. Hayes testified that Mr. Hyde returned to her the draft she gave him and that she subsequently destroyed it.

There was much other evidence on both sides.

At the close of the evidence the respondents made twenty-seven requests for rulings. Thirteen of these requests were granted by the judge, and the rulings requested were given by him as instructions to the jury. Nine other of the requests are held by this court to have been refused properly because they either assumed the truth of facts which were in dispute or attempted to put arguments for the respondents into the mouth of the judge, or did both of these things.

The other requests for rulings which were refused by the judge were as follows:

"11. A will which is different from the previously expressed purpose of the testatrix and which is different from what it would have been if she had been in full possession of her faculties and had acted under independent advice, should be set aside.

"12. The question of undue influence and mental incapacity cannot be separated where the testatrix was of advanced age and suffering from a disease affecting her brain and vital powers."

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"18. If it is shown that at the time of the execution of the will the testatrix' mind was enfeebled by age and disease, even though not to the extent producing mental unsoundness, and the testatrix acted without independent and disinterested advice, and in the presence of the beneficiary under her will, and such gift was of the whole or a large portion of the testatrix' estate, and operated wholly or substantially to deprive those having a natural claim upon her bounty of all benefit in her estate, these circumstances authorize the jury to find the will void through undue influence without proof of specific acts and conduct on the part of the party charged with exerting undue influence."

"21. The fact that all the evidence of Mrs. West's statements and acts regarding the making of a will and the disposition of her property comes from Mrs. Hayes, who is the sole beneficiary under the alleged will, renders her testimony open to the closest scrutiny and gravest doubt, and unless the provisions of the will can be otherwise satisfactorily explained, it cannot be allowed to stand."

"26. The fact that Mrs. Hayes stood in a relation of trust and confidence to Mrs. West, who asked her advice, which Mrs. Hayes gave to her own advantage and to the injury of all other relatives would warrant the jury in disallowing the will."

The jury sustained the will, answering the first and second issues in the affirmative and the third issue in the negative; and the respondents alleged exceptions to the refusals of the judge to make the rulings requested by them.

The case was submitted on briefs.

J. H. Colby, *E. A. Bayley* & *J. M. Cochran*, for the respondents.

A. S. Hayes, for the petitioner.

SHELDON, J. The questions argued in this case arise upon the refusal of the judge to give certain instructions that were specifically asked for by the respondents. There was doubtless a great body of evidence which called for serious consideration by the jury upon the question whether Mrs. West's will was procured through the fraud or undue influence of Mrs. Hayes, the only beneficiary thereof; but if this question was answered wrongly by the verdict, the respondents' only redress is by application to the judge for a new trial for that reason. *Aiken* v.

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Holyoke Street Railway, 180 Mass. 8. As was said by Montgomery, J., in *Asbury* v. *Charlotte Electric Railway & Power Co.* 125 N. C. 568, 573, we cannot criticise the verdict of the jury.

The eleventh request could not have been given in the form asked for. The fact that a will differs from the previously expressed purpose of the testatrix, or from what it would have been if, besides being in full possession of her faculties, she had acted under independent advice, does not require it to be set aside. She had the right to change her mind and to select her own advisers. And the jury were sufficiently told that the will could not be sustained unless the petitioner proved that the testatrix was of sound and disposing mind and memory.

The fourteenth, seventeenth, nineteenth, twentieth, twenty-second, twenty-third, twenty-fourth, twenty-fifth and twenty-seventh requests are all objectionable, and the judge was not required to give them. Some of them assumed the truth of facts which were in dispute; most of them were attempts to put arguments for the respondents' contentions into the mouth of the judge, by calling upon him to charge so as to emphasize certain portions of the evidence. All of them were obnoxious to one or both of these objections. Both fraud and undue influence were sufficiently defined and explained in what was said to the jury.

All the contentions of the respondents mentioned in the eighteenth request were sufficiently explained to the jury; and it was made plain to them that they might infer the existence of undue influence from the facts mentioned in this request, if they found these facts to be proved and chose to draw such an inference. This was as far as it was the duty of the judge to go. *Woodbury* v. *Woodbury*, 141 Mass. 329. *Banfield* v. *Whipple*, 14 Allen, 13, 14.

It would not have helped the jury to state to them the abstract proposition of law contained in the twelfth request. It is true of course, as argued by the respondents, that a person may have sufficient capacity to make a will if let alone and yet not be of sufficient capacity to resist the pressure upon him of strong influence; and the question whether the use of such influence is lawful or not often may depend, and perhaps in this case did depend, upon the condition of mind and body of the person upon whom it is exercised. *Dexter* v. *Codman*, 148 Mass. 421, 424.

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Bacon v. *Bacon*, 181 Mass. 18, 22. But that is not what the judge was asked to say to the jury. He had a right to refuse this request.

As to the twenty-first request, it is enough to say that a judge has not the right to tell a jury that the testimony of a witness is open to the gravest doubt. R. L. c. 173, § 80. *Commonwealth* v. *Barry*, 9 Allen, 276, 278.

Nor ought the twenty-sixth request to have been given in terms. It was a question for the jury to determine whether and how far there was a relation of trust and confidence between Mrs. Hayes and the testatrix. If the jury found this fact to be as contended by the respondents, it would be a material circumstance for them to consider, and they would be warranted in saying that the will should not be sustained without proof to their entire satisfaction that it did express the real intentions of the deceased. *Jones* v. *Simpson*, 171 Mass. 474, 477. *Davenport* v. *Johnson*, 182 Mass. 269. But this is a very different proposition from that which was asked for by the respondents.

No exception was taken to any of the instructions given; but only the refusal to give the instructions which have been mentioned was excepted to. If the respondents feared that the language used by the judge might be taken in a broader sense than they deemed consistent with the law, they should have called his attention to the matter. *McKee* v. *Tourtellotte*, 167 Mass. 69, 72.

Exceptions overruled.

JOHN LOFTUS *vs.* ELEAZAR D. JORJORIAN & another.

Worcester. January 21, 1907. — February 26, 1907.

Present: KNOWLTON, C.J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Contract, Building contract. *Set-off. Damages*, Recoupment. *Pleading, Civil*, Answer. *Architect. Arbitrament and Award.*

Where a contract for the erection of a building provides that if the contractor fails to perform his part of the contract the owner may terminate the employment of the contractor and finish the work himself and if the unpaid balance of the

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amount to be paid under the contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner, and where a subsequent clause of the contract fixing the contract price provides "that the sum to be paid by the owner to the contractor for said work and materials shall be" the amount named, "subject to additions and deductions as hereinbefore provided," the contractor in suing on this contract, after he has failed to complete his work and the building has been finished by the owner, in order to recover must show affirmatively that the balance due him exceeds the amount of the expense properly incurred by the owner in finishing the work, and for this purpose expenses properly incurred by the defendant must be deducted although their amounts were determined after the commencement of the action and for that reason they could not be included by the defendant in a declaration in set-off. Such expenses are not deducted by way of recoupment and may be shown by the defendant under a general denial.

Where a building contract provides that the expenses incurred by the owner of a building in finishing it after the contractor has failed to do so "shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties," in the trial of an action upon the contract, if it appears that the architects' certificates of such expenses, which are put in evidence by the defendant, were made properly and seasonably and there is no evidence of bad faith in their issue, they are conclusive as to all matters within the authority of the architects.

CONTRACT for a balance of $1,721.08 alleged to be due under a contract in writing for the erection of a building on Beacon Street in Worcester and also the sum of $633.08 for extra work and materials, the plaintiff alleging that he performed his part of the contract until further performance was stopped by unreasonable objections on the part of the defendants. Writ dated June 13, 1903.

The defendants filed an answer containing a general denial, a plea of payment and a declaration in set-off, alleging that the plaintiff so failed to perform the work required of him by the contract that the defendants took possession of the building and finished it, thereby incurring expense and damage which left a balance of $1,425 due from the plaintiff to the defendants.

In the Superior Court the case was referred to William J. Taft, Esquire, as auditor, and later was heard upon the auditor's report by *Fox*, J., without a jury. The auditor found for the defendants in set-off for the sum of $466.72 with a proviso in the nineteenth paragraph of his report that "if the certificates described in the eighteenth paragraph of this report are conclusive upon the rights of the parties then the amount found due

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the defendants, in the preceding clause, should be increased by the sum of five hundred and twenty-five dollars."

At the hearing before the judge no evidence except the auditor's report was offered by either side. The plaintiff asked the judge to make the following rulings:

First. That there has not been filed in this case any sufficient declaration in set-off entitling the defendants to a judgment for an excess over the amount claimed to be due the plaintiff.

Second. That the certificates mentioned in the seventeenth and eighteenth findings in the auditor's report should not have been allowed by the auditor as items in set-off, because there were no such amounts determined "at the commencement of the action" as required by the statute.

Third. That the items numbered respectively 28, 34 and 35 in the defendants' declaration in set-off are not proper items to be allowed in set-off.

Fourth. That the items numbered 13, 32 and 38 in the defendants' declaration in set-off are not proper items to be allowed in set-off.

Fifth. The defendants may not recover both by way of recoupment and also by set-off under the pleadings.

The judge made the following memorandum of findings:

"The plaintiff contends that certain items found in the defendants' declaration in set-off are not proper items of set-off, because they are for unliquidated damages and because the architects' certificates therefor were made after the date of the writ.

"These objections would be good if these items could be considered only in set-off. But under the contract the plaintiff is not entitled to recover the contract price, but only the contract price less the expense and damage incurred by the owner, and he cannot prevent the defendants from availing themselves of the architects' certificates in defence by bringing his suit before the damage has been ascertained. All items which cannot be used in set-off may properly be used in reduction of the plaintiff's claim for the contract price; and as the items which are proper items of set-off are more than enough to sustain any judgment to which the defendants are entitled, the technical difficulty disappears.

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"As the auditor has found that there is no evidence of bad faith in the issuance of the certificates, it follows that the architects' certificates as to all matters within their authority are conclusive, and the balance in favor of the defendants must be increased by the sum of five hundred and twenty-five dollars."

The contract was dated August 2, 1902. The fifth article was as follows:

"Art. V. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after three (3) days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties."

The ninth article began as follows:

"Art. IX. It is hereby mutually agreed between the parties

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hereto that the sum to be paid by the owner to the contractor for said work and materials shall be $13,675.00/100 thirteen thousand six hundred seventy-five and 00/100 dollars; subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the owner to the contractor in installments, as follows:" [Here followed the stipulations as to the times of payment.]

The judge found for the defendants, and assessed damages upon the declaration in set-off in the sum of $1,202.95. The plaintiff alleged exceptions.

The case was submitted on briefs.

J. B. Ratigan, J. E. Swift & J. J. Moynihan, Jr., for the plaintiff.

G. S. Taft & E. I. Morgan, for the defendants.

SHELDON, J. The second, third and fourth rulings asked for by the plaintiff apparently were given, but the judge ruled that the amount of the items mentioned, so far as proved, if not allowed in set-off, could properly be used in reduction of the contract price. This was correct. The promise of the defendants in Article IX. of the agreement sued on was not to pay to the plaintiff the sum therein mentioned, but to pay said sum "subject to additions and deductions" as before provided in the agreement; and these items are properly to be included in such deductions. Accordingly they were not deducted from the plaintiff's claim by way of recoupment, but were deducted from the contract price to ascertain the sum with which the plaintiff was to be credited. For the same reasons it is evident that the plaintiff's fifth request was given.

The judge correctly ruled that the architects' certificates, there being no evidence of bad faith in their issue, were conclusive as to all matters within their authority. *Hebert* v. *Dewey*, 191 Mass. 403. *White* v. *Abbott*, 188 Mass. 99. These certificates were properly and seasonably made; and the judge rightly gave them their full effect.

The exception to the refusal to give the first request has not been argued; and we treat it as waived.

Exceptions overruled.

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JAMES J. POWER *vs.* DAVID BEATTIE & another.

Bristol. October 24, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Negligence. Maxims. Pleading, Civil, Variance. *Practice, Civil,* Conduct of trial. *Words,* "Delivery."

In an action against a contractor engaged in constructing a building by a teamster for personal injuries from being thrown from his team owing to the defective condition of an inclined temporary roadway down which he was driving in delivering stone in the cellar of the building in process of construction, there was evidence that the plaintiff was driving two horses attached to a stone gear, that in using the same roadway on four previous days and twice on the morning of the accident the plaintiff had found it safe, that on the occasion of the accident he was carrying a load of three stones weighing five or six tons, that he stopped his team on the opposite side of the street, waiting for orders, until a man whom he had seen giving directions on the lot during the three or four days preceding the accident told him to "come on," as he had been told to do on all the previous occasions when he delivered stone on the lot, that he drove across the sidewalk and saw that a piece had been cut off the end of the roadway, making a hole which went down like a flight of steps, that his horses were walking but he did not stop them because they could not hold the load, that he was standing on his team as he drove in and when he reached the cut his forward wheels went down, and he was injured. *Held*, that there was evidence for the jury of due care on the part of the plaintiff; *also*, that it could not be said that the plaintiff assumed the risk of the accident and the maxim *volenti non fit injuria* had no application.

In an action against a contractor engaged in constructing a building by a teamster for personal injuries from being thrown from his team owing to the defective condition of an inclined temporary roadway down which he was driving in delivering stone in the cellar of the building in process of construction, there was evidence that since the last time that the plaintiff had driven over the temporary roadway a cut had been made in it so as to make it dangerous to drive a heavily loaded team over it, that in using the same roadway on four previous days and twice on the morning of the accident the plaintiff had found it safe, that on the occasion of the accident he stopped his team on the opposite side of the street, waiting for orders, until a man whom he had seen giving directions on the lot during the three or four days preceding the accident told him to "come on," as he had been told to do on all the previous occasions when he delivered stone on the lot, that thereupon he drove down the roadway and the accident occurred. The plaintiff was unable to identify the man who told him to come on. It appeared that the defendant employed a foreman and a sub-foreman, both of whom were upon or about the premises at the time of the accident. Both of these men testified that they did not call to the plaintiff to come on. It did not appear that any workman other than those of the defendant were in or about the cellar. *Held*, that there was evidence for the

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jury of negligence on the part of some one for whose acts the defendant was responsible in inviting the plaintiff to drive down the roadway without informing him that its condition had been changed for the worse since the last time he used it.

In an action against a contractor engaged in constructing a building by a teamster for personal injuries from being thrown from his team owing to the defective condition of an inclined temporary roadway down which he was driving in delivering stone in the cellar of the building in process of construction, the declaration alleged that the plaintiff was in the employ of one R. who had contracted with the defendant to deliver to him certain quantities of stone for building purposes on certain premises within the control of the defendant, and "that it was the duty of the defendant to provide for R. and his servants a safe and suitable way for the delivery" of the stone upon the premises within his control, which the defendant negligently failed to do. It appeared that when the accident occurred the plaintiff was employed by R. to carry stone from a railroad station to the lot upon which the building was being constructed by the defendant, but there was no evidence of a contract between the defendant and R. *Held*, that the word "delivery" when read in connection with the other language of the declaration should not be confined to a delivery under a contract with the defendant, but included any transfer of possession of the stone from R. through the agency of the plaintiff to the defendant with the defendant's consent, and that a person engaged in such delivery was rightfully on the premises in control of the defendant and was entitled to a reasonably safe place in which to make the delivery or to have a reasonable opportunity to determine whether to make it or not, so that it was not necessary for the plaintiff to prove a contract between the defendant and R. and without evidence of such a contract, upon proof of due care on the part of the plaintiff and of negligence on the part of the defendant, a verdict for the plaintiff could be supported on the declaration.

A trial judge cannot be required to make a ruling based on a particular view of a portion of the evidence.

TORT by a teamster for personal injuries from being thrown from his team and having a stone fall on his leg owing to the defective condition of an inclined temporary roadway down which he was driving in delivering stone in the cellar of a building in process of construction by the defendants. Writ dated March 26, 1904.

The plaintiff's amended declaration was as follows: "And the plaintiff says that on the 17th of July 1903 he was in the employ of one Peter Rafter of Taunton, and that said Rafter had contracted with the defendants to deliver to them certain quantities of stone for building purposes on certain premises within the control of the defendants, and situated on the north side of Court Street, in Taunton, in said county; that on the 17th day of July 1903 while in the employ of said Rafter and as his servant in the execution of said contract with the defendants, with horses and team delivered several loads of stone to the

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defendants on said premises on said Court Street; that it was the duty of the defendant to provide for Rafter and his servants a safe and suitable way for the delivery of said stones upon the premises within their control, but these defendants carelessly and negligently failed so to do but did furnish the plaintiff an unsafe, dangerous and defective way, whereby and while in the exercise of due care, the plaintiff was hurt and injured, to his great damage."

In the Superior Court the case was tried before *Holmes*, J. The evidence showed that the accident happened at about half past two o'clock in the afternoon of July 17, 1903. The defendants had made a contract to erect a new registry building in Taunton, and were engaged in the construction of the building at the time of the accident. The plaintiff was employed by one Peter Rafter to carry stone from the railroad station to the lot upon which the building was being erected. He had a stone gear, the platform of which was about four and one half feet high, drawn by two horses, and had been engaged in the work of delivering stone on the county lot for about four days before the accident, and had delivered four loads a day. On the day of the accident he delivered two loads in the morning, the last one at about half past eleven. In order to deliver the stone he had to drive over a block paved incline about eighteen inches long and seven inches high across the sidewalk, which was seven or eight feet wide, through a gateway on to the lot, and straight ahead for a distance of about thirty-five feet down an inclined earth roadway five or six feet wide and about two feet lower at the end than at the beginning, with a gradual slope into the cellar of the building. During all the time of the plaintiff's employment there were a number of men at work in the cellar, some laying stones, some tearing down the old building and others excavating. The plaintiff's team was unloaded by men working on the lot at the end of this way. The plaintiff testified that at the time he delivered the last load of stone before the accident the roadway into the cellar was in the same condition that it had been during all the time he had worked; that he came with another load of three stones weighing five or six tons at about half past two in the afternoon, and as he got up on to the sidewalk saw that a change had been made at the end of the way, and a piece had

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been cut off, making a hole which went down like a flight of stairs; his horses were walking; that he did not stop his horses because they could not hold the load; that before he drove on to the lot he stopped his team on the opposite side of the street from the building "and waited for orders to see where the stone would go to," until a man whom he had seen giving directions to the workmen on the lot during the three or four days preceding the accident told him to "come on"; and that this had been the procedure on all the previous occasions when he had delivered stone on the lot; that he was standing on his team as he drove in, and when he reached the steps where the cut had been made his forward wheels went down, and he was injured. He could not identify the man who told him to come on. His statements were somewhat conflicting as to whether he could see the place of the accident from the sidewalk, although he testified that there was nothing to obscure his vision from the sidewalk to the bottom of the cellar, but on cross-examination he was asked the question "When you got on the sidewalk you knew it was cut, but could not stop?" and answered "Yes."

One Sheehy, called by the plaintiff, described the way into the cellar from the sidewalk as having a gradual incline with a difference of about a foot and a half between the highest point at the entrance of the way and the lowest point at the end of the inclined way in the cellar. When he got to the plaintiff immediately after the accident he found that the way at the place of the accident had been cut down on the right hand side, so that it was about two feet lower than on the left hand side.

One of the defendants testified that at the time of the accident he was engaged in the construction of the county building, but had no contract or agreement with Peter Rafter for the delivery of his stone, and that his contract was with the Quincy Granite Construction Company; that he had a foreman and a sub-foreman at work on the premises but no other persons in authority under him, and that he was not present at the time of the accident.

One Puleston, called by the defendants, testified that he was the foreman for the defendants, and did not tell the plaintiff to "come on" or speak to him at the time of the accident; that the sidewalk was level and about seven or eight feet wide, the gutter being six or seven inches lower than the sidewalk; that

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the plaintiff's horses came down the incline into the cellar at a slow trot, and were stopped after they left the incline and on level ground by a pile of bricks and mortar, which threw the stone and the plaintiff off the team, causing the injury. One Knox testified that he was the sub-foreman under Puleston; that he did not speak to the plaintiff at all about entering the premises, nor call to him.

The defendants, among other requests, asked the judge to make the following rulings:

1. The plaintiff was not in the exercise of due care.

2. The plaintiff assumed the risk of the accident which happened to him.

3. The doctrine of *volenti non fit injuria* applies here and the plaintiff cannot recover.

4. There is no evidence that negligence of the defendants caused the accident.

5. Upon all the evidence in the case the plaintiff is not entitled to recover.

6. The plaintiff was not lawfully upon the premises where the accident happened by reason of any contract made between his employer and the defendants which he was carrying out.

7. There was no invitation by the defendants or by any one authorized by them to extend an invitation to the plaintiff to enter upon the premises, and the plaintiff cannot recover under his declaration.

8. Under the plaintiff's declaration he is not entitled to recover unless he proves that he was on the premises where the accident happened as a servant of Rafter in the execution of a contract entered into between the defendants and Rafter.

9. If the plaintiff when he drove across Court Street and up to the sidewalk on Court Street had a clear, unobstructed view of the roadway up to the place of the accident, and saw its condition, or in the exercise of reasonable care should have seen its condition, then he cannot recover.

11. There is no evidence in the case which would warrant the jury in finding that the grade of the way on which the accident happened was improper, unsafe and dangerous, and the plaintiff is not entitled to recover under his specifications.

12. If the jury finds that the accident happened by reason of

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the sinking of the right forward wheel in the ground the plaintiff cannot recover.

The judge refused to make any of these rulings, and submitted the case to the jury with instructions to which no exception was taken. The jury returned a verdict for the plaintiff in the sum of $750; and the defendants alleged exceptions.

J. W. Cummings, (*C. R. Cummings* with him,) for the defendants.

W. E. Kelley, for the plaintiff.

RUGG, J. The case was properly submitted to the jury, and the instructions requested by the defendants were rightly refused. The three main questions are extremely close. It is not for us to decide upon the facts, however, but only to determine whether there was sufficient evidence to support the finding by the jury for the plaintiff.

1. There was no want of due care on the part of the plaintiff in relying upon the signal of the man, whom he had seen giving directions to workmen about the premises, and who had, during the three or four days of his work, given him the signal to drive into the cellar, under conditions which had been before found to be reasonably safe. There was evidence that when he reached the point where he could see the changed condition of the way into the cellar, it was impossible for him to hold his team. Although the force of this evidence was considerably shaken upon cross-examination, yet upon the whole it cannot be said that there was insufficient ground for finding the fact to be as stated by the plaintiff. If there was no negligence on his part in driving his heavily loaded gear upon the sidewalk, and if after reaching this place, which was the first point on his route from which he could see the changed and dangerous condition of the way over which he was to drive into the cellar, it was beyond his power to stop his team, in that case the burden upon him of showing his own due care was sustained. If the jury found this to be the situation, then there was no occasion for the application of the maxim *volenti non fit injuria*.

2. If the evidence of the plaintiff be taken at its full value, it warranted a finding that although he knew of the excavation going on in the cellar, and the likelihood of general changed conditions there, yet habitually during his experience one who

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appeared to be exercising general control over the men at work about the place had beckoned him forward, and at all such times he had been able to drive into the cellar with safety, and that he had been in the habit of stopping on the opposite side of the street to await this invitation. Although the plaintiff was unable to identify this man, nevertheless, it appearing that the defendants employed a foreman and a sub-foreman, both of whom were upon or about the premises at the time of the accident, the jury may have inferred in connection with other evidence that one of these men gave the signal to drive forward. Both of these men testified that they did not call to the plaintiff to come on, but this particular testimony may have been discredited by the jury. As it did not appear that any other workmen were in or about the cellar save those in the employ of the defendants, the jury might have found that a man, who for three or four days had been giving directions to the workmen, and who had continuously told the plaintiff to come on, whenever he had driven into the cellar, was acting under the authority of the defendants. All these circumstances together are enough to support a finding of negligence on the part of some one, for whose doings the defendants were responsible, in thus inviting the plaintiff to drive down the way without advising him that its condition had been changed for the worse since his last previous trip. There was also evidence from both the plaintiff and Sheehy that the condition of the way into the cellar at the time of the accident was such as to make it dangerous to drive a heavily loaded team over it.

3. The averments of the plaintiff's declaration at the lowest set up an employment of the plaintiff by Rafter as a driver and the delivery as such driver of quantities of stone to the defendants on the premises for the purpose of building, and a statement of the duty on the part of the defendants to provide for Rafter and his servants a safe place for the delivery of the stone. The word "delivery" as thus used should not be construed in a narrow or technical sense, and, when read in connection with the other language of the declaration, it imports a transfer of possession of the stone from Rafter through the agency of the plaintiff to the defendants, with the latter's consent. This being so, a person engaged in such delivery was rightfully upon

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the premises of the defendants, and was entitled to a reasonably safe place in which to make the delivery, or a reasonable opportunity to determine for himself whether he would undertake to make the delivery under all the circumstances. While the declaration is not to be commended as pleading, it is sufficient, upon all the evidence, to support the verdict.

4. What has been said disposes of all the requests for rulings except the twelfth. This was properly refused. A trial judge "cannot be required to give a ruling based upon some particular view of a portion of the testimony." *Shattuck* v. *Eldredge*, 173 Mass. 165, 168.

Exceptions overruled.

JAMES CANNON *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. November 16, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence. Railroad.

An experienced section hand, engaged in tamping ties on one of four parallel tracks of a railroad where trains are running at frequent intervals, who, when the smoke from a locomotive engine passing upon a parallel track has obscured the tracks for a considerable distance, is apprehensive of danger and stands in the middle of a track looking toward a station from which a train must come and is struck by a train which suddenly emerges from the smoke, is not in the exercise of due care. Under such circumstances common prudence requires him to stand by the side of the track and wait there for the smoke to lift.

TORT, under the employers' liability act, by a section hand for personal injuries sustained while working on one of four parallel tracks of the defendant about three hundred and eighty yards from the station of the defendant called Boylston Street. Writ dated May 12, 1903.

In the Superior Court *Holmes*, J. at the close of the plaintiff's evidence ordered a verdict for the defendant; and the plaintiff alleged exceptions.

T. J. Ahern, for the plaintiff.

J. L. Hall, for the defendant, was not called upon.

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BRALEY, J. Irrespective of any inquiry as to the defendant's negligence, unless it is shown that the plaintiff was in the exercise of due care at the time of the accident he cannot recover. From the material and undisputed evidence given by him, it appears that when injured he had been engaged in working on that section for the defendant or its predecessor in the ownership or control of the railroad for thirty-six years, and was thoroughly familiar with the number and location of the tracks, and the running of trains. Upon the morning of the injury he had been engaged in tamping ties, and necessarily was prevented from performing continuous work, as he would not only be obliged to stop and wait for trains to pass, but must look out for their approach. These conditions of which he had full knowledge were obvious, and by reason of his long experience the plaintiff must be held to have appreciated and understood if he neglected to watch for passing trains there was imminent danger of physical injury. The very nature of the service implied that he was expected and permitted to perform his work in his own way, using reasonable delays to guard against perils to which otherwise he would be exposed. At the time of the accident smoke from a locomotive engine passing upon a parallel track had so obscured for a considerable distance the track where the plaintiff was at work, that when looking in the direction of the station from which it must come he could not see an approaching train. Being apprehensive, however, of such a danger, he stood in the middle of the track looking towards the station when suddenly a train emerged from the smoke, and he was struck. In explanation of his conduct he stated that the smoke was so dense that he could see but a short distance, when because of this obstruction his view of a coming train would be cut off. But to stand deliberately in the middle of the track, and expose himself to a manifest danger, as at any moment a train might be expected, rather than to remain in safety on the side of the track, and there wait for the smoke to lift, evinces such a plain disregard of common prudence as to constitute contributory negligence. *Coombs* v. *Fitchburg Railroad*, 156 Mass. 200. *Content* v. *New York, New Haven, & Hartford Railroad*, 165 Mass. 267. *Dyer* v. *Fitchburg Railroad*, 170 Mass. 148.

Exceptions overruled.

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MAGGIE M. McKARREN *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

Suffolk. November 20, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Evidence, Photographs.

In an action for personal injuries photographs of the injured portion of the plaintiff's person may be admitted in evidence without calling the photographer as a witness, if they are found by the presiding judge to be verified by the testimony of a medical expert who testifies that the photographs were taken in his presence and under his direction.

In an action for personal injuries photographs of the injured portion of the plaintiff's person, properly verified and admitted in evidence, which were taken in the presence and under the direction of the physician who attended the plaintiff and are used by the physician in describing as a witness the nature and extent of the plaintiff's injuries, must be considered as forming a part of the physician's testimony.

The preliminary finding of a trial judge as to the sufficiency of the verification of a photograph for the purpose of admitting it in evidence is final.

TORT for personal injuries alleged to have been caused by the sudden starting of a car of the defendant from which the plaintiff was alighting. Writ dated August 16, 1902.

At the trial in the Superior Court before *Bell*, J. the jury returned a verdict for the plaintiff in the sum of $3,600; and the defendant alleged exceptions to the admission in evidence of certain photographs which are described in the opinion.

C. M. Davenport, for the defendant.

L. H. Wardwell, (*S. A. Fuller* with him,) for the plaintiff.

BRALEY, J. During the testimony of the physician who attended the plaintiff, in describing the nature and extent of the enlargement of a portion of the vertebrae of her spine, photographs of this portion of the back were introduced, and used by him as illustrations. While the photographer was not called, the witness, whose medical qualifications were not questioned, testified that the photographs were taken in his presence, and under his direction, and upon admission they must be considered as forming a part of his evidence. *Alberti* v. *New York, Lake Erie & Western Railroad*, 118 N. Y. 77, 88. The

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competency of such evidence if relevant, whether consisting of a model, diagram, map, plan, picture or photograph is established, and is admitted for the purpose of giving to the jury a representation of the object or subject concerning which the inquiry is made, and to enable them better to understand the issues on trial. *Blair* v. *Pelham*, 118 Mass. 420, 421. Before admission, however, there must be a verification of the accuracy of the representation, and this is a preliminary inquiry to be made by the presiding judge whose decision is final. *Clapp* v. *Norton*, 106 Mass. 33. *Commonwealth* v. *Coe*, 115 Mass. 481. *Walker* v. *Curtis*, 116 Mass. 98. *Blair* v. *Pelham*, *ubi supra*. *Verran* v. *Baird*, 150 Mass. 141. *Farrell* v. *Weitz*, 160 Mass. 288. *Gilbert* v. *West End Street Railway*, 160 Mass. 403. *Commonwealth* v. *Robertson*, 162 Mass. 90. *Van Houten* v. *Morse*, 162 Mass. 414, 422. *Harris* v. *Quincy*, 171 Mass. 472, 473. *Carey* v. *Hubbardston*, 172 Mass. 106. *Beals* v. *Brookline*, 174 Mass. 1, 18. *Commonwealth* v. *Morgan*, 159 Mass. 375, 378. *Commonwealth* v. *Fielding*, 184 Mass. 484. *State* v. *Cook*, 75 Conn. 267. The defendant places great reliance upon *Cunningham* v. *Fair Haven & Westville Railroad*, 72 Conn. 244, as an authority establishing a different rule, but after discussing the weight to be given such a finding the court expressly say "We are not now called upon to determine the legal correctness of a finding of this kind, nor whether it can be reviewed; the question presented by the record is whether it was error to admit this photograph without any evidence of its accuracy."

The defendant contends that a higher degree of verification was necessary and should have been required than when the representation describes inanimate objects, as the accuracy of the reproduction of the animate human form varies according to the position and adjustment of the camera, the skill of the artist, and condition of the atmosphere. It is undoubtedly true that the photographer may produce a picture which is misleading when compared with the subject represented, but so can the civil or mechanical engineer by his plan, drawing, or model made by hand, and while such misrepresentations may result from lack of professional skill, or proper adjustment of the photographic apparatus, it also may be the deliberate product of the most

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skilful exercise of the art. This ground of possible deception when the human form is either wholly or partially portrayed was not, however, recognized as a distinction in *De Forge* v. *New York, New Haven, & Hartford Railroad*, 178 Mass. 59, where a radiograph of a fractured human foot, if properly taken, was held to be admissible when verified in the usual manner, while in *Commonwealth* v. *Campbell*, 155 Mass. 537, and in *Commonwealth* v. *Morgan*, *ubi supra*, upon the question of identity, a photograph showing the defendant's personal appearance was held to have been properly admitted. In each of these cases physical characteristics were depicted, and if admissible to show the appearance of one part of the human body there would seem to be no sufficient reason why a photograph of other parts, when relevant, and properly verified, should be excluded. The testimony of the photographer was not required if the judge was satisfied by other evidence, as he apparently was, that they were substantially accurate representations of the plaintiff's person. *Commonwealth* v. *Morgan*, *ubi supra*. *Van Houten* v. *Morse*, *ubi supra*. *Archer* v. *New York, New Haven, & Hartford Railroad*, 106 N. Y. 589, 603. *McGar* v. *Borough of Bristol*, 71 Conn. 652, 655.

Exceptions overruled.

MARY J. DURBIN, administratrix, *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. November 20, 21, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Railroad. Negligence.

By an express provision of R. L. c. 111, § 267, a railroad corporation is not liable for causing the death of a person while walking or being upon its road contrary to law or to the reasonable rules and regulations of the corporation. Even without such an express provision, there could be no liability to such a trespasser unless there was wilful or reckless misconduct on the part of the railroad corporation or its servants.

TORT under R. L. c. 111, §§ 267, 268, for causing the death of Alice Durbin, the plaintiff's intestate, while she was travelling

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along Oak Street in Needham where the tracks of the defendant cross Oak Street at grade. Writ dated May 10, 1903.

At the trial before *Wait*, J. it appeared that the plaintiff's intestate when struck by the train and killed was not upon Oak Street but was walking down the defendant's track. The judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

F. F. Sullivan, for the plaintiff.

J. L. Hall, for the defendant, was not called upon.

BRALEY, J. Upon the undisputed evidence the plaintiff's intestate had turned from the side of the highway where it crossed the railroad track, and having passed within the defendant's location was walking in the middle of the roadbed, when she was struck and instantly killed by a passing train. At common law, not having survived the injury, no action could be maintained, and the plaintiff relies on the provisions of R. L. c. 111, §§ 267, 268. *Smith* v. *Thomson-Houston Electric Co.* 188 Mass. 371, 376. But as the decedent's life was not lost by a collision with the defendant's engine or cars at a grade crossing the remedy given by § 268 is inapplicable, and it is expressly provided by § 267, that if at the time of death the person killed is walking on its road contrary to law the corporation shall not be liable.

Even without such a statutory provision, the decedent being a trespasser, the plaintiff could not recover unless wilful or reckless misconduct on the part of the defendant's engineer was shown, and of this there is no evidence. *Johnson* v. *Boston & Maine Railroad*, 125 Mass. 75. *Wright* v. *Boston & Albany Railroad*, 142 Mass. 296. *McCreary* v. *Boston & Maine Railroad*, 153 Mass. 300, 304.

It consequently becomes unnecessary to consider the other questions argued.

Exceptions overruled.

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GRACE MACFARLANE, administratrix, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

SAME *vs.* CITY OF CAMBRIDGE.

Middlesex. November 22, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Way. Street Railway. Negligence. Bicycle.

A city engaged in repairing one of its streets and a street railway company which is obliged by law to repair the portions of such street between its tracks perform their respective duties toward travellers on the highway if they give them proper warning to enable them to avoid the danger occasioned by the work, and this may be done by putting up signs and barriers indicating the portion of the street withdrawn from public travel by reason of the repairs being made upon it which render it for the time unfit for use.

In actions under R. L. c. 51, §§ 17, 18, respectively against a city and a street railway company, obliged by law to repair the portions of highways between its tracks, for injuries to and the death of the plaintiff's intestate caused by an alleged defect in a highway in the space between the rails of the track of the railway company, it appeared that one of the parallel tracks of the railway and the side of the street adjoining that track were undisturbed and open for travel, while the other track was being paved with brick between the rails and the side of the street adjoining it was dug up and in process of paving by the city, that the space between the two tracks was in part dug up and was unfit for travel, that the track which was being paved had been raised a foot above the level of the street on each side, and that the paving between the rails had been completed except for three openings, each a few feet in length and filled with sand, the pavement of the track also being covered with a thin layer of sand, that at each end of the work a red flag had been set between the two tracks and there were wooden horses extending from the relaid track across the part of the street where the work was going on, indicating that this part of the street was closed for travel, but the track itself was not barred, as the rails were in place and cars were passing over them, that the plaintiff's intestate was riding on a bicycle upon the unfinished pavement of the relaid track and coming to one of the holes filled with sand was thrown upon the other track in front of an approaching car and was killed. *Held*, that there was no evidence of negligence or of failure of duty on the part of either of the defendants, they having given sufficient notice that the part of the way undergoing repairs, including the relaid track, was dangerous and was withdrawn from public travel; and *semble*, that the plaintiff's intestate in disregarding this notice and going forward on the unfinished pavement of the track without taking precautions to ensure his safety was not in the exercise of due care.

A city or town, or a person obliged by law to repair a highway, owes the same kind of duty to travellers on bicycles as to those travelling in other ways, but a person riding on a bicycle has no right to disregard a notice that a part of a street is not open to public travel by reason of repairs being made upon it merely because he can ride with his bicycle in a place where ordinary vehicles cannot go.

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TWO ACTIONS OF TORT under R. L. c. 51, §§ 17, 18, R. L. c. 111, § 267, and R. L. c. 171, § 2, by the administratrix of the estate of Robert H. MacFarlane respectively against the Boston Elevated Railway Company and the city of Cambridge, for personal injuries to and the death of the plaintiff's intestate, and for injuries to his property caused by being thrown from a bicycle while riding on Massachusetts Avenue in Cambridge at a point opposite its intersection with Windsor Street, on August 16, 1904. Writs dated November 16, 1904.

In the Superior Court the cases were tried together before *Hardy*, J., who at the close of the plaintiff's evidence ordered verdicts for the defendants. The plaintiff alleged exceptions.

S. D. Elmore, for the plaintiff.

H. Bancroft, (*W. Shuebruk* with him,) for the Boston Elevated Railway Company.

G. A. A. Pevey, for the city of Cambridge.

KNOWLTON, C. J. The plaintiff's intestate, while riding on a bicycle on one of the tracks of the defendant railway company, came upon a place filled with sand, where work which was then being done was unfinished, and he was thrown upon the other track in front of an approaching car and killed. The two defendants were engaged in reconstructing and repaving the street, the city doing that part of the work outside of the tracks of the street railway, and the railway company that part within its tracks. The street had settled, and at the place of the accident one of the tracks had been raised about a foot above the level of the street on each side. The work on the northerly side, in charge of the city, was then going on, the northerly track had been raised, and paved except for three openings, each of a few feet in length, which had been left for the construction of a cross-over from one track to the other, and the paving of the track had been covered with a thin layer of sand, and the openings in it had been filled with sand nearly to the level of the adjacent paving. In each case the principal questions are whether there was evidence to warrant the jury in finding negligence on the part of the defendants' servants and due care on the part of the plaintiff's intestate.

In the declaration against the railway company there were different counts, but in each case there was a count under the

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R. L. c. 51, §§ 17, 18, which impose upon a railway company, doing the work between its tracks under a permit from the city, the same liability for the condition of the surface there that the city is under in reference to its condition in other places.

The southerly track and the street on the southerly side of it remained undisturbed and were open for travel. The northerly side of the street was dug up for repairs, and was obstructed by material so that much of the way it was impassable. Part of the pavement between the two tracks was dug up, and that part of the street was unfit for travel. According to the undisputed testimony there were wooden horses extending from the track across the northerly part of the street indicating that this part of the street was closed to travel. There was testimony that the horses bore the usual sign, "No passing through," or "Street closed for repairs," but this was contradicted. At either end of the work between the tracks a red flag was set, showing that this part of the street was not open for use. Between the rails of the northerly track there was no sign or obstruction, as the rails were in position, and the cars were passing over them. But the horses, coming up to the rails on the northerly side, and the red flag between the tracks, gave reasonable notice to travellers that the street was being repaired and was withdrawn from public use from the southerly track to the outer line of travel on the northerly side. This included the northerly track of the railway, on which fresh sand showed that work had lately been done there. It had been raised, so that at the place of the accident it was about a foot above the surface on each side of it.

There is no doubt that the defendants were engaged in making proper repairs, and there is no ground for a contention that the work was not being done properly. What was the duty of the respective defendants in regard to the work done by each, so far as it might affect the safety of travellers on the highway? It was to give them proper warning, such as would enable them to avoid the danger. If they put up signs and barriers which showed that one side of the street was withdrawn from public travel by reason of the repairs being made upon it, which rendered it for the time unfit for use, they performed their duty. On receiving notice of this kind, it was the duty of a traveller

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to use only that part of the way which was left open for use. Such a notice was equivalent to a statement that the way was dangerous, was not to be used, and that the defendants would not be responsible for any accident that might happen from the use of it. One who should pass over it, after receiving such a notice, would be bound to know that he was travelling at his own risk, and that the city and the railway company owed him no duty to make further provision for his safety.

In the present case the defendants could have done nothing more, unless they provided a watchman who should attempt, by active measures, to keep persons out of danger who voluntarily had disregarded sufficient warnings given by signs and barriers.

None but persons on bicycles could have reached this place of danger without great inconvenience. Persons driving in ordinary vehicles would be precluded by the fact that the track was a foot above the surface on either side, and that the pavement was dug up on both sides of these rails. Travellers on foot would go upon the sidewalk. While a person on a bicycle might think that he could get through upon the track, and while the defendants owed the same kind of duty to travellers on bicycles as to those travelling in other ways, one riding on a bicycle could not disregard the notice that this part of the street was not open for public travel, by reason of repairs. He was bound to know that this notice left the defendants with no further duties in regard to the defective condition of the street, and if he undertook to go forward without taking precautions for himself that would ensure his safety, he was not in the exercise of due care.

We are of opinion that there was no evidence of negligence on the part of either of the defendants. *Jones* v. *Collins*, 177 Mass. 444. *Compton* v. *Revere*, 179 Mass. 413. *Butman* v. *Newton*, 179 Mass. 1, 9. *Torphy* v. *Fall River*, 188 Mass. 310. *McMahon* v. *Boston*, 190 Mass. 388. See also *Hyde* v. *Boston*, 186 Mass. 115, and cases cited; *Harvey* v. *Malden*, 188 Mass. 133.

Exceptions overruled.

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LEWIS EARNSHAW *vs.* CHARLES WHITTEMORE & another.

Middlesex. November 22, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Contract, Consideration, Performance and breach, Rescission.

Where a contract is modified by agreement of the parties by adding a provision not before contained in it the additional obligation requires no new consideration to support it, the modified contract taking effect by way of substitution.

At the trial of an action for the price of bottles sold under a contract in writing, in which the defendant did not deny the amount of the plaintiff's claim but alleged in recoupment a breach of contract by the plaintiff from which the defendant had sustained damages to an amount greater than that claimed by the plaintiff, it appeared that after a part of the bottles had been delivered the contract was modified by adding a provision that "bottles called for on this contract are to be made by union workmen or this contract cancelled," that after repeated demands by the defendant for union made bottles the plaintiff informed the defendant that he could not furnish such bottles and suggested that the contract be cancelled, that the defendant declined to terminate the contract and demanded its performance, claiming damages for the plaintiff's failure to deliver the bottles called for, and also transferred his moulds which had been in the possession of the plaintiff to another manufacturer. The trial judge ruled that the defendant could recoup damages to the extent of the plaintiff's claim, and, as the damages suffered by the defendant exceeded the claim of the plaintiff, found for the defendant. *Held*, that when the plaintiff refused to perform his part of the contract the defendant not only became entitled to recover such damages as had been caused by the breach but also was excused from further performance on his part, and that the transferring of the moulds was no breach of the contract on the part of the defendant as it was done after the refusal of performance by the plaintiff; that the option of the right of cancellation, which was given by the contract in case of a failure by the plaintiff to furnish bottles made by union workmen, was for the sole benefit of the defendant and did not deprive him of his right to demand and recover damages for the plaintiff's breach of contract; therefore that the defendant was entitled to judgment.

CONTRACT by one claiming under an assignment from the Cumberland Glass Manufacturing Company, a corporation organized under the laws of the State of New Jersey, for the price of bottles sold by that corporation to the defendants under a contract in writing dated February 25, 1902, with an indorsement thereon dated July 15, 1902. Writ dated May 20, 1903.

The defendants in their answer, not denying the amount of the plaintiff's claim, alleged in recoupment a breach of contract by the plaintiff's assignor from which the defendants had sustained damages to an amount greater than that claimed by the plaintiff.

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In the Superior Court the case was referred to Arthur D. Hill, Esquire, as auditor, with a stipulation that his findings as to all questions of fact should be final. The auditor found for the defendants, and ruled as matter of law, first, that the plaintiff was not entitled to maintain his action because he had not established that the deed of assignment under which he claimed was the deed of the Cumberland Glass Manufacturing Company, and, second, that if his first ruling was wrong, and the assignment should be held to be valid, in which case it was admitted that the plaintiff in the absence of recoupment would be entitled to maintain his action for the amount stated in the declaration, the defendant was entitled to recoup for an amount in excess of the plaintiff's claim.

The assignment under which the plaintiff claimed was as follows:

"Assignment of an Account.

"Know all men by these presents, That the Cumberland Glass Manufacturing Co., a new Jersey corporation duly established by law and having a usual place of business at Bridgeton, N. J., in consideration of one dollar and other valuable consideration to it paid by Lewis Earnshaw of Boston, Mass. aforesaid (the receipt whereof is hereby acknowledged) do hereby sell, assign and transfer to said Lewis Earnshaw all and whatever sum or sums of money now due and coming due to it from Whittemore Bros. & Co. of said Boston to have and to hold the same to the said Lewis Earnshaw with power to collect the same in his own name and as attorney, hereunto duly authorized to his own use.

"It is expressly understood, however, that the said Cumberland Glass Mfg. Co. are forever to be kept and saved harmless by the said Lewis Earnshaw from all cost or charge hereafter in any way or manner, for and from the expense of the collection of the sum and sums hereby sold and assigned.

"In witness whereof I have set my hand and seal this twenty-second day of May, 1903.

"Cumberland Glass Mfg. Co.
"R. E. Shoemaker, Pres.

"Signed, sealed and delivered in presence of
"John E. Perry."

(Corporate Seal.)

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In regard to this instrument the auditor made the following finding: "The signature was in the handwriting of one R. E. Shoemaker and the seal was affixed by him. No other evidence was offered as to Shoemaker's authority to execute the deed on behalf of the Cumberland Company than the fact that he purported to sign as president."

The contract sued upon consisted of an order in writing for certain kinds of bottles in certain quantities at prices named, dated February 25, 1902, addressed to the Cumberland Glass Manufacturing Company and signed in the firm name of the defendants, below which was an acceptance in writing signed "Cumberland Glass Co., by Richard M. More."

Indorsed across the face of this contract was the following:

"Boston, July 15, 1902. Bottles called for on this contract are to be made by Union Workmen or this contract Cancelled.

"Cumberland Glass Co.

"By Richard M. More."

The facts in regard to the failure to perform the contract are stated sufficiently in the opinion.

The case was heard upon the auditor's report by *Fessenden*, J. The plaintiff asked the judge for eighteen rulings, many of which were made by him. The first ruling requested was that the defendants could not recover upon their answer in recoupment. The judge made this ruling but ruled that the defendants could recoup damages to the extent of any claim of the plaintiff alleged in the action.

The judge refused to make the following rulings:

"4. That the contract made February 25, 1902, with the indorsement of July 15, 1902, does not, as a matter of law, require that the goods delivered under it be union made goods."

"6. That if, under the contract of February 25, 1902, either union or non-union made goods could be delivered, and the indorsement of July 15th restricted this, so that the Cumberland Glass Manufacturing Co. were obliged to deliver only union made goods, such an addition or restriction requires a new consideration and would be invalid without it." [The judge in refusing to make this ruling stated that there was evidence of consideration.]

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"9. That, under the contract as indorsed July 15th, if the Cumberland Glass Manufacturing Company failed to furnish union made goods, the defendant's only right was to cancel the contract by way of rescission."

"11. That under the indorsement of July 15th, the term 'contract cancelled' gave the right of rescission to either the Cumberland Glass Manufacturing Company or the defendants.

"12. That under the indorsement of July 15th, if the Cumberland Glass Manufacturing Company failed to deliver union made goods, the defendants were only entitled to rescind the contract and cannot recoup in damages in this action."

"14. That the defendants in ordering away the moulds from the Cumberland Glass Manufacturing Company put it out of the power of said company to perform said contract, and after said date the company would not be responsible for damages for its failure to furnish the defendants with goods.

"15. That the orders given by the defendants for no further shipment of goods, the removal of the moulds, and the refusal to accept further goods were an exercising by the defendants of their right to cancel the contract and constituted a cancellation."

"17. That in order to entitle the plaintiff to recover, it was not necessary under the pleadings that the plaintiff should introduce evidence to show the authority of R. E. Shoemaker to execute the assignment in behalf of the Cumberland Glass Manufacturing Company.

"18. That under the pleadings, the assignment bearing the corporate seal, with the signature of the president of the company, was some evidence of the validity of the assignment which, in the absence of other evidence to control it, would entitle the plaintiff to recover."

In refusing to make the last two rulings the judge stated that there was no evidence that R. E. Shoemaker was president of the Cumberland Glass Manufacturing Company or in any way had authority to affix its name and seal to the purported assignment.

The judge found for the defendants; and the plaintiff alleged exceptions.

E. M. Brooks, for the plaintiff.

E. F. McClennen, for the defendants.

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BRALEY, J. It was agreed at the trial that the findings of the auditor, whose report forms part of the bill of exceptions, should be final upon questions of fact. After reciting these findings he thereupon ruled and reported that the plaintiff had failed to prove his title to the claim in suit, but if this ruling was wrong, he further ruled, that the defendants under their answer in recoupment had suffered damages in a larger sum than the plaintiff claimed, and found in their favor. The rulings refused asked for a reversal of the report of the auditor, whose rulings the plaintiff contends cannot be sustained on the facts reported.

We first consider the question of recoupment which comprises the merits of the controversy. The original contract contained no provision that the bottles should be made by union workmen, although the defendants subsequently insisted that there had been a preliminary understanding to this effect. In consequence of their assertion of this claim, and as a result of correspondence between the parties, a duly authorized agent of the plaintiff's assignor indorsed upon the face of the contract that "bottles called for on this contract are to be made by union workmen or this contract cancelled." This indorsement must be deemed an additional agreement to be treated as a modification of the existing contract, which as thus modified is supported by the original consideration. *Thomas* v. *Barnes*, 156 Mass. 581. *Drew* v. *Wiswall*, 183 Mass. 554, 556. *Taylor* v. *Finnigan*, 189 Mass. 568, 574, 575.

The contract as finally completed being limited to bottles of this description, it was undisputed that after repeated demands such bottles were not furnished, and the vendor informed the defendants that compliance was impossible. In reply to a suggestion that they cancel the contract, the defendants, while recognizing their right of termination, promptly declined to exercise it, and insisted upon performance, with a further claim for damages already suffered by reason of the failure to deliver the goods for which they had bargained. *Hubbardston Lumber Co.* v. *Bates*, 31 Mich. 158, 169. They also directed that their moulds, which had been in the possession of the vendor, should be transferred to another manufacturer, and this transfer was made accordingly. It is plain that this failure to comply with the contract was the cause of its abandonment by the defendants, upon whom by

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reason of an inexcusable breach the right of termination was conferred. *Eastern Forge Co.* v. *Corbin*, 182 Mass. 590, 592, and cases cited. By its refusal to perform the vendor could not make an unjustifiable act a justification by which it could escape liability for damages which thereby resulted, as the option of cancellation was for the sole benefit of the vendee whose right to abandon did not arise until the breach. *Hapgood* v. *Shaw*, 105 Mass. 276, 280. *National Machine & Tool Co.* v. *Standard Shoe Machinery Co.* 181 Mass. 275. *Meagher* v. *Hoyle*, 173 Mass. 577, 579. The right of one party to a contract of sale to be excused from further performance where the other party has absolutely refused to perform is distinct from a right to rescind, as upon such refusal the innocent party has the right to recover damages for the injury suffered, but if rescission has taken place the contract then ceases to exist, and not even nominal damages can be recovered. *Whiteside* v. *Brawley*, 152 Mass. 133, 134. *Spcirs* v. *Union Drop Forge Co.* 180 Mass. 87, 92. For this reason when the vendor refused to perform, the defendants not only became entitled to recover such damages as had been caused by the breach, but were excused from further performance upon their part. *Hapgood* v. *Shaw*, *ubi supra*. *National Machine & Tool Co.* v. *Standard Shoe Machinery Co.*, *ubi supra*. *United States* v. *Peck*, 102 U. S. 64. The sum which the defendants were entitled to recover, although not stated, has been found to be in excess of the amount due for bottles delivered before the contract was abandoned, and, because the vendor could not recover, the plaintiff as its assignee is barred, for he succeeded to the same infirmity. R. L. c. 173, § 4. *Andrews* v. *Tuttle-Smith Co.* 191 Mass. 461. If an absolute refusal to perform had not been shown, and it appeared that the vendor in good faith was endeavoring to carry out the contract, a different question would be presented. *Collins* v. *Delaporte*, 115 Mass. 159, 162.

The order transferring the moulds could not be deemed a breach by the defendants which destroyed their right to damages, as it was not given until the vendor had notified them of its inability to fulfil the contract. Upon receiving this information they were not required to allow the moulds to remain, but were at liberty to use them in such manner as they considered the prosecution of their business demanded. *Hinckley* v. *Pittsburgh*

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Bessemer Steel Co. 121 U. S. 264. *Rogers* v. *Union Stone Co.* 134 Mass. 31, 38. The rulings requested but not given on this branch of the case, therefore, were refused properly.

As the plaintiff's assignor could recover nothing, the further question in regard to the validity of the assignment under which the plaintiff claims title becomes immaterial. See *England* v. *Dearborn*, 141 Mass. 590; *New England Ins. Co.* v. *Wing*, 191 Mass. 192. Compare *Hamilton* v. *McLaughlin*, 145 Mass. 20, 22, *Williamsburg Ins. Co.* v. *Frothingham*, 122 Mass. 391, 394, and *Murphy* v. *Welch*, 128 Mass. 489, 491.

Exceptions overruled.

BENJAMIN F. SMITH & another *vs.* VOSE AND SONS PIANO COMPANY.

Suffolk. November 23, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Evidence, Extrinsic affecting writings. *Words*, "Water."

In an action to recover the contract price for drilling an artesian well under a contract in writing to procure "twenty-five gallons of water per minute," the defendant may show by oral evidence that the word "water" meant fresh water suitable for drinking and for other purposes for which salt water could not be used.

In an action on an agreement in writing to recover the contract price for drilling an artesian well for a corporation engaged in the manufacture of pianos, it appeared that by the contract the plaintiff undertook "to procure water in the earth above the bed rock" on the defendant's premises by driving in the boiler room of the factory a pipe two and one half inches in diameter, but if a sufficient amount was not obtained then to "drill a well not less than six inches in diameter in the bed rock . . . until twenty-five gallons of water per minute is obtained." The plaintiff drilled a well which finally produced this volume of water but the water was very salt and unsuitable for use in the defendant's business. The plaintiff contended that he had performed his contract. The defendant offered to show by oral evidence that during the preliminary negotiations which resulted in the contract the plaintiff was informed by the defendant that its object in driving the well was to obtain a supply of water to be drunk by its workmen and to be used for other purposes in the defendant's factory for which salt water could not be used, that the defendant also informed the plaintiff that it could not use salt water for anything, and that if salt water was wanted it could be obtained within a few feet of the surface by an ordinary duplex pump, that the plaintiff agreed to furnish water as good as the water produced by a well dug by the plaintiff for a certain brewing company which

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the defendant had tested and knew to be good. The evidence was excluded by the judge against the exception of the defendant, and a verdict was returned for the plaintiff. *Held*, that the exclusion of the evidence was wrong, and that the defendant was entitled to a new trial, the evidence being admissible to show the meaning of the word "water" as used in the contract in writing.

CONTRACT upon an agreement in writing to recover the contract price for drilling an artesian well upon certain premises belonging to the defendant, a corporation organized under the laws of the State of Maine, and engaged in the manufacture of pianos in Boston. Writ dated October 7, 1903.

In the Superior Court the case was tried before *Schofield*, J. It appeared that the contract was drawn wholly by the plaintiffs, and consisted of a proposition, contained in a letter written by the plaintiffs to the defendant dated February 24, 1903, which was accepted by the defendant. The letter and the acceptance were as follows:

"Vose & Sons Piano Co.,
"158 Boylston St., Boston.

"Gentlemen:

"We herein submit a proposition to drive at your new factory, Massachusetts Ave., Boston, in your boiler room at a place designated by your superintendent, Mr. Vose, a 2 1-2 inch extra strong lap welded pipe, using extra strong couplings, and do the best we can to procure water in the earth above the bed rock for the sum of one dollar ($1.00) per foot. If a sufficient amount of water is not obtained, and we drive a pipe by our steam drilling machine to bed rock, and drill a well not less than six inches in diameter in the bed rock, no charge will be made for the 2 1-2 inch pipe driven, but we are to have the privilege of pulling up the pipe.

"In case a well is drilled by steam power, it will be done in the following manner: — we agree to drive a lap welded pipe not over twelve inches or less than eight inches to the bed rock, then drill in the bed rock a hole not over ten or less than eight inches in diameter, in the bed rock to a depth of ten feet, tapering the hole in the rock to the outside diameter of the six or eight inch pipe.

"If the water and earth formation above is not shut off by the larger pipe driven to the rock, we will drive either six or an eight inch pipe firmly into the tapered hole prepared for it, and after the well is finished, we will furnish Portland cement and cement

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between the inside pipe and the bed rock to keep out the surface water and the sand. Then we will continue to drill a hole not less than six inches in diameter in the bed rock until twenty-five (25) gallons of water per minute is obtained, for the sum of three dollars and seventy-five cents ($3.75) per foot, provided the aforesaid amount of water is obtained within three hundred feet. For over three hundred feet, the price will be four dollars and twenty-five cents ($4.25) per foot.

"This is with the understanding that this proposition is accepted within six days from date, as the prices given are much below our regular price for doing such work, and are given to keep our men at work for a short time, this being our dull season.

"Your Company is to furnish us with steam for our engine and a small amount of coal for forge for sharpening our drills.

"We will make two pump tests of ten hours each, during which time twenty-five (25) gallons of water per minute must be pumped continuously.

"We will furnish all the necessary pipe, fittings, valves, and pipe for steam from your boiler to our engine, and cover the pipes outside the building to keep the steam from condensing.

"Should any accident occur, such as breaking of tools or drilling a crooked hole, to prevent our further drilling before the above stated amount of water has been obtained, no charge will be made for the work done, but we are to have our privilege of drilling another of the same size under this contract.

"As verbally agreed with your Mr. Julian W. Vose, we further agree in case a small amount of water is obtained with the two and one half inch (2 1-2) test well, and if your Company should pump and make use of it, and we drive and drill a six inch well for you by steam power, no charge will be made for the 2 1-2 inch well. Otherwise we are to have the privilege of pulling up the pipe.

"Yours truly,

"B. F. Smith & Bro."

"We accept the above proposition.

"Vose & Sons Piano Co."

The plaintiffs testified that they drilled with a two and a half inch pipe to the depth of one hundred and five feet. This drilling was abandoned, and the plaintiffs then, with a steam drill,

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drilled through sand and clay to a depth of one hundred and forty-one feet, when water was struck flowing at a rate in excess of twenty-five gallons a minute. This water was very salty and had a great deal of sand in it. The defendant was dissatisfied with water of this character as being unsuitable for general use in its business, and made known its dissatisfaction to the plaintiffs. The plaintiffs thereupon continued drilling, driving a ten inch pipe to bed rock at a depth of about one hundred and eighty feet, then drove the pipe four feet into the bed rock, where the drilling became very difficult, as appeared by the fact that one hundred blows with a heavy hammer would not move the sharp edged shoe or cutting band tempered on to the end of the pipe more than one eighth to one fourth of an inch. This the plaintiffs testified shut off the salt water and sand from above. The plaintiffs continued to drill a ten inch hole to a depth of two hundred and twenty feet when salt water again was struck, a witness for the plaintiffs, one Smith, testifying, that they drilled the well about two hundred and twenty feet and found water, but it was salty. The plaintiffs continued drilling, driving a six inch hole to the depth of two hundred and forty feet, when a pumping test was made, and a flow of water was obtained in excess of twenty-five gallons a minute, but it was very salt and the defendant's agent testified that it was absolutely unsuitable for any of the general purposes of the defendant's factory, and of no use to the defendant. The plaintiffs asserted that they had performed their contract, and demanded payment, which was refused by the defendant, who demanded performance.

For the purpose of showing the character of the water to be furnished to the defendant under the contract, the defendant offered to show oral conversations between its agent and an agent for the plaintiffs before the execution of the contract on which the action was brought, the conversations being had with a view to the formation of the contract subsequently made, in which the agent of the defendant told the agent of the plaintiffs that salt water would be unavailable for use in the defendant's business, that it could not be used in the defendant's plumbing plant, and that the water which the defendant required must be fit to be put to the following uses, to wit: to be drunk by the defendant's workmen, to be used by them for washing their persons, to

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be used with pumice stone in rubbing down the varnish on the defendant's pianos, to be used in rubbing with rotten stone, to be used in automatic sprinklers, to be used for sprinkling granolithic floors, where sprinkling was necessary every day on account of the dust, and to be used in the mixing of glue; and that in reply the agent of the plaintiffs undertook to furnish to the defendant water suitable for such purposes. This evidence was excluded by the judge, and the defendant excepted.

The defendant offered to show statements as to the purposes for which the water required by the defendant would be used and as to the unavailability of salt water, substantially identical with those set forth in the exception stated above made by the agent of the defendant to the agent of the plaintiffs, and that the defendant was induced to enter into the written contract which the plaintiffs, being laymen, had prepared and submitted, and upon which the action was brought, by the promise of the plaintiffs' agent that they would furnish water suitable for such purposes. This evidence was excluded, and the defendant excepted.

The defendant offered to show statements regarding the unavailability of salt water for the defendant's uses, and the purposes to which water required by the defendant would be put, substantially identical with those set forth above, which were made by the defendant's agent to the agent of the plaintiffs, and that in reply thereto the latter requested the agent of the defendant to test the water produced by a well constructed by the plaintiffs at the premises of the Star Brewing Company, that well being five hundred and ten feet deep and distant from the defendant's premises fifteen hundred feet, the plaintiffs' agent stating that the water obtained from the well was used by the Brewing Company in making their beer and that it was good enough for the defendant's use; that the agent of the defendant did, as suggested, test the water produced by that well by drinking some of it, and found it fit for that purpose; that thereafter the agent of the defendant said to the agent of the plaintiffs, "If you can furnish water good as the water of the Star Brewing Company, I will make an arrangement with you to have the water," and that the agent of the plaintiffs said that they would furnish water equally good, but they might have to go down into

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the earth more than five hundred and ten feet. This evidence was excluded, and the defendant excepted.

For the purpose of showing the character of the water to be furnished to the defendant under the written contract, the defendant offered to show conversations before the making of the contract, in which the agent of the defendant stated that it could not use salt water for anything, and that if salt water was wanted it could be obtained by an ordinary duplex pump within a few feet of the surface. This evidence was excluded, and the defendant excepted.

For the purpose of showing the character of the water under the written contract to be furnished to the defendant, the defendant offered to show that before the making of the contract the plaintiffs had attempted to induce the defendant to agree to pay as the work progressed, and that the defendant refused to agree to pay anything until water was furnished substantially of the character and kind furnished by the well of the Star Brewing Company. This evidence was excluded, and the defendant excepted.

For the purpose of showing the character of the water to be furnished to the defendant under the written contract, the defendant offered to show conversations between the agents of the respective parties before the making of the contemplated contract in which it was pointed out by the plaintiffs that they might have to go below five hundred feet to get the kind of water required and that the work might cost the defendant two or three thousand dollars. This evidence was excluded, and the defendant excepted.

The judge ruled, generally, that conversations had before the making of the contract were merged in it, that the word "water" must stand there as it was, without explanation of what occurred up to that time, unless it was altered subsequently by some oral agreement, and that the written agreement must stand just as it was. To this ruling the defendant excepted.

Other evidence offered by the defendant was excluded by the judge, and at the close of the evidence the defendant asked for certain rulings which were refused by the judge.

The jury returned a verdict for the plaintiffs in the sum of $1,011; and the defendant alleged exceptions, of which those

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not stated above have been made immaterial by the decision of the court.

T. Parker, for the defendant.

A. L. Stinson, for the plaintiffs.

BRALEY, J. Upon omitting other provisions relating to the price and the depth that might be necessary to obtain the stated amount of supply, but not material to the principal question involved, the plaintiffs undertook by their contract "to procure water in the earth above the bed rock" on the defendant's premises by driving in the boiler room of the factory a pipe two and one half inches in diameter, but if a sufficient amount was not obtained then to "drill a well not less than six inches in diameter in the bed rock . . . until twenty-five gallons of water per minute is obtained." They finally procured this volume, but the water was very salt, and generally unsuitable for use in the defendant's business, and, it being common knowledge that water in its natural state either may be fresh or salt in quality, the defendant contends that as the contract failed to designate the ordinary sense in which the parties must have used the term, oral evidence was admissible to explain and remove the uncertainty. Unless fraud or mistake are shown, where the parties have put their contract in writing, there is a conclusive legal presumption, that it contains the entire agreement in which all previous verbal negotiations concerning the subject matter have been merged. *Violette* v. *Rice*, 173 Mass. 82. *DeFriest* v. *Bradley*, 192 Mass. 346. But if any of the essential terms of the contract when applied to the transaction concerning which the parties dealt becomes ambiguous, oral evidence is relevant and admissible, not to construct a new agreement, but to ascertain what they understood by the one already made. *Stoops* v. *Smith*, 100 Mass. 63. *Hebb* v. *Welsh*, 185 Mass. 335. *Buffington* v. *McNally*, 192 Mass. 198. These familiar principles are undisputed, but the difficulty arises in their application, especially where the agreements are drawn by the parties or their business agents, who fail to use clear and exact language to express their mutual understanding. It was the plaintiffs' interpretation, that they had fully performed their undertaking if the amount of water was procured, even if it was wholly unsuitable either because of saltness or impurity. The

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defendant then offered evidence, that during the preliminary negotiations the agent of the plaintiffs was informed and knew that its object in driving the well was to procure a supply of water for drinking and other uses in its manufactory, for either of which salt water could not be used, and would be unserviceable. This offer also included conversations between their respective agents in which the location of the factory, and the accessibility to salt water, which, if desired, could be obtained at a small expense, was spoken of, as well as a statement by the plaintiffs' agent, that they would furnish water of a quality equally good, when compared with water obtained for another customer, the quality of which was known to the defendant's agent, who thereupon said, that if this were done the defendant would be satisfied. The testimony was excluded, upon the ground that conversations previous to the making of the contract must be held to have been merged, and oral evidence in explanation of the use and meaning of the word "water" therefore was inadmissible. But, while this rule is undoubtedly correct, and should be inflexibly applied where no ambiguity or uncertainty appears, when the parties by the language they have employed leave their meaning obscure and uncertain when applied to the subject matter, then the expressions and general tenor of speech used in the previous negotiations, even if coming as they usually must from one or the other of the parties themselves, are admissible to show the conditions existing at the time the transaction was under consideration. See for illustrations *Bradford* v. *Manly*, 13 Mass. 139; *Hogins* v. *Plympton*, 11 Pick. 97; *Stoops* v. *Smith*, *ubi supra*; *Miller* v. *Stevens*, 100 Mass. 519; *Pike* v. *Fay*, 101 Mass. 134; *Sweet* v. *Shumway*, 102 Mass. 365; *Keller* v. *Webb*, 125 Mass. 88; *New England Dressed Meat & Wool Co.* v. *Standard Worsted Co.* 165 Mass. 328; *Boak Fish Co.* v. *Manchester Assurance Co.* 84 Minn. 419. Their definition when thus ascertained furnishes the best interpretation of their contract, the construction of which still remains as a question of law for the court. *Atwood* v. *Cobb*, 16 Pick. 227, 232. *Stoops* v. *Smith*, *ubi supra*. *Bassett* v. *Rogers*, 162 Mass. 47. *Lynn Safe Deposit & Trust Co.* v. *Andrews*, 180 Mass. 527, 533. *Callender, McAuslan & Troup Co.* v. *Flint*, 187 Mass. 104. *Buffington* v. *McNally*, *ubi supra*. *American Malt-*

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ing Co. v. *Souther Brewing Co.* 194 Mass. 89. *United States* v. *Peck*, 102 U. S. 64. *Smith* v. *Faulkner*, 12 Gray, 251, 255.

The evidence, therefore, was excluded wrongly, and as there must be a new trial at which the other questions raised by the exceptions may become immaterial, or be presented in another form, we do not consider them.

Exceptions sustained.

JOHN F. MEAD *vs.* ASA P. MORSE.

Middlesex. November 26, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Contract, Performance and breach. *Equity Jurisdiction*, To relieve against forfeiture. *Interest.*

In an action on a bond to convey to the plaintiff certain land of which he was in possession, when the defendant had discharged certain attachments on the land, upon the plaintiff giving a note for a certain sum secured by a mortgage of the land, on which the plaintiff had built houses with money lent to him by the defendant to be included in the sum secured by the mortgage, with a provision that until the conveyance was made the plaintiff should pay interest and taxes and keep the buildings on the premises insured, there was evidence, including the plaintiff's testimony, that after the execution of the bond, the plaintiff being about to build an additional house on the land, the defendant agreed to lend him the money necessary for this purpose and agreed that the interest due from the plaintiff to the defendant should be treated as part of the money so lent and should be applied by the plaintiff directly to paying bills incurred in erecting the additional house, and that the amount should be included in a second mortgage to be given by the plaintiff to the defendant at the time of settlement, that after the additional house had been built under this arrangement the plaintiff by agreement with the defendant put the houses he had built into the defendant's possession and permitted him to receive the rents to apply upon the payment of interest and taxes, and that the amount so received by the defendant was in excess of all sums due for interest and taxes, when the plaintiff tendered a mortgage note for the amount due under the bond and demanded a conveyance of the land. The presiding judge refused to order a verdict for the defendant, and the jury returned a verdict for the plaintiff. The defendant upon the argument of exceptions relied on the following provision of the bond, under which he contended that he had taken possession of the land: "And it is expressly provided and agreed that upon failure by the obligee to perform the aforesaid conditions in regard to the payment of interest, taxes, and assessments, and in regard to insurance, waste and liability, the obligor may take possession of the premises and collect for his own use the rents and profits thereof, and this obligation shall be absolutely void." It did not appear

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that this contention was made at the trial. The defendant also contended that the plaintiff had failed to pay the taxes on the land and the interest on the advances for the house last built by the plaintiff. The defendant never had asked for an accounting to fix the amount to be secured by the second mortgage for advances on this house. *Held*, that, if the defendant had contended at the trial that he had taken possession under the forfeiture clause of the bond, the question whether he had done so would have been one for the jury, and they could not have found for the defendant on this issue without finding that the plaintiff's testimony was untrue; moreover, that, if there had been such a forfeiture, it would have been one against which equity would give relief on compensation being made within a reasonable time, and that this principle would have governed an accounting, which the plaintiff had sought; that the verdict of the jury included a finding that the plaintiff had put into the hands of the defendant sufficient funds to pay all taxes and interest, and that, as to interest on the advances for the house last built, there could be no default until there had been an accounting to fix the amount to be secured by the second mortgage for those advances, for which the defendant never had been ready.

CONTRACT for alleged breach of a bond dated March 15, 1900, as modified by a subsequent oral agreement between the parties. Writ dated April 1, 1902.

The bond was as follows:

"Know all men by these presents that I, Asa P. Morse of Cambridge in the County of Middlesex, and Commonwealth of Massachusetts, am holden and stand firmly bound unto John F. Mead of said Cambridge in the sum of thirty-five thousand two hundred and fifty ($35250) dollars, to the payment of which to the said obligee, or his executors, administrators, or assigns, I hereby bind myself, my heirs, executors, and administrators.

"The condition of this obligation is such that whereas the said obligor has agreed to sell and convey unto the said obligee a certain parcel of real estate with the buildings thereon situated in said Cambridge, and bounded and described as follows, namely: [Description.]

"The same to be conveyed by a quitclaim deed of the said obligor, free from all incumbrances made or suffered by the obligor.

"And whereas for such deed and conveyance it is agreed that the said obligee shall pay the sum of thirty-five thousand two hundred and fifty dollars, of which one dollar has been paid this day, and the remainder is to be paid by the note of the said obligee, dated March 15, 1900, bearing interest at five per cent. per annum, payable quarterly, and secured by a power of sale

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mortgage, in the usual form, upon the said premises, such note to be payable three years after the date thereof; and whereas it is agreed that until default in the performance of the terms of this obligation, the obligee may hold and enjoy the said premises and receive the rents and profits thereof; and that, upon the aforesaid sum, that is to say thirty-five thousand two hundred and fifty dollars, the obligee shall pay interest from the date of this obligation at the rate of five per cent. per annum payable quarterly, the first payment to be made in three months from the date of this obligation and that until default in the performance of the terms of this obligation, the obligee shall pay all taxes and assessments, to whomsoever laid or assessed, on the aforesaid premises or on account of any interest thereon, and shall keep the buildings on said premises insured against fire in a sum not less than $15,000.00 for the benefit of the obligor, and his executors, administrators, and assigns, in such form and in such companies as they shall approve; and shall not commit or suffer any strip or waste of the premises; and shall save the obligor harmless from loss on account of injury or damage to person or property through said estate or the condition or management thereof:

"Now therefore, if the said obligor shall, upon the tender by the said obligee of the aforesaid note and mortgage at any time within one month after the dissolution of the attachments at present subsisting upon said premises, and upon due performance by the obligee of the aforesaid conditions in regard to the payment of interest, taxes, and assessments, and in regard to insurance, waste, and liability, deliver unto the said obligee a good and sufficient deed as aforesaid, then this obligation shall be void, otherwise shall be and remain in full force and virtue.

"And it is expressly provided and agreed that upon failure by the obligee to perform the aforesaid conditions in regard to the payment of interest, taxes, and assessments, and in regard to insurance, waste and liability, the obligor may take possession of the premises and collect for his own use the rents and profits thereof, and this obligation shall be absolutely void. And it is agreed that all existing contracts relating to said estate are hereby cancelled.

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"In witness whereof I hereunto set my hand and seal this 15th day of March A. D. 1900.

"Asa P. Morse (Seal)

"Witness Edw. E. Clark."

The subsequent oral agreement is stated in the opinion.

At the trial in the Superior Court before *Bond*, J. the jury returned a verdict for the plaintiff in the sum of $17,133.69; and the defendant alleged exceptions, raising the questions considered in the opinion where the material evidence and the course of the trial are described.

The case was submitted on briefs.

C. G. Bancroft, for the defendant.

H. P. Harriman, J. L. Sheehan & H. E. Perkins, for the plaintiff.

LORING, J. This case comes up on an exception to a refusal to direct a verdict for the defendant, and on an exception to one portion of the judge's charge. The case went to an auditor. The only evidence on the question of the defendant's liability came from the auditor's report and from the testimony of the plaintiff at the trial. The defendant was an old man unable to testify before the auditor or at the trial. He died less than three months after the verdict. The administrators of his estate were allowed to come in and defend the action, the plaintiff having given his consent. Most of the facts appear in the auditor's report.

The defendant was the owner of a lot of land in Cambridge, and the plaintiff was a builder. Previous to March 15, 1900, the defendant had agreed to sell and the plaintiff had agreed to buy the land in question for $12,000. The defendant also had advanced money to the plaintiff for the building of five houses on it, which then were completed.

On March 15, 1900, the plaintiff and the defendant had a settlement of all matters between them, and their rights each against the other were reduced to writing in the form of two bonds, one given by the plaintiff to the defendant and the other by the defendant to the plaintiff.

The bond given by the defendant to the plaintiff which, together with a subsequent oral agreement, is the foundation of the action now before us, provided in substance that the amount

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due from the plaintiff to the defendant on March 15, 1900, was $35,250; that the defendant was to convey the premises to the plaintiff by a quitclaim deed free from all incumbrances made or suffered by the defendant, and the plaintiff was to give back a mortgage securing the $35,250 with interest at five per cent. It appeared however that there were attachments on the premises in actions against the defendant. In consequence thereof it was agreed (so far as is material here) that the plaintiff should be let into possession of the premises and the rents and profits thereof, paying the interest on the $35,250 and all taxes and assessments, and keeping the premises insured in the sum of $15,000 for the benefit of the defendant. The condition of the bond was that the defendant, upon the tender of a mortgage within one month after the dissolution of the attachments and upon the due performance by the plaintiff of the terms of the agreement just stated as to paying taxes and keeping the property insured, should convey the land to the plaintiff.

In the May following the date of the bond the plaintiff began the erection of a sixth house on the same lot of land. He testified in effect that he applied to the defendant for funds for the erection of the additional house, and that the defendant agreed to let him have for this purpose the interest money to be paid under the mortgage for $35,250, and further sums in addition, and that these advances for the sixth house were to be secured by increasing the amount of the mortgage note provided for in the bond of March 15, 1900, or by a second mortgage on the premises. And it further was agreed that the plaintiff, in place of actually paying over to the defendant the interest due on the $35,250 and then receiving back these sums so paid as an advance for the erection of the sixth house, should apply them directly to paying bills incurred in erecting that house and account to the defendant accordingly.

The auditor found that the defendant advanced to the plaintiff for the sixth house $5,300, including the interest due on the $35,250 and advances in addition thereto.

It appeared that the sixth house was completed in October, 1900.

The plaintiff testified at the trial that from March 15, 1900, to November 6, 1900, a period of nearly eight months, he paid

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no money to the defendant, the interest due during that period being included (as we understand it) in the $5,300 aforesaid; that on November 6, 1900, he began making payments to the defendant and continued down to December 16, 1901, a period of substantially thirteen months, and that during that period he paid $3,246; that he paid the taxes for the year 1900, but did not directly pay the taxes for the year 1901; that on January 24, 1902, by an arrangement which he made with the defendant, he put the defendant in possession of the houses on certain conditions; that on February 1, 1902, the defendant received the January rents, amounting to $402, making the total amount received by the defendant $3,648.

The plaintiff further testified that in February, 1902, he was told by the insurance agent that the defendant had cancelled the insurance on the building and said he had "thrown the plaintiff out."

Thereupon the plaintiff consulted an attorney, and on February 21, 1902, he called on the defendant and tendered a mortgage note for $35,250, dated March 15, 1900, indorsed interest paid to February 21, 1902. The plaintiff further testified that he had put into the sixth house much more than the interest due on the $35,250, and that "he understood that, if anything was due the defendant for interest when he came to take his deed and give his mortgages, it was to go into the additional mortgage; that the defendant, at the time he told the plaintiff he could take the rents and put them into the house instead of paying the defendant, said the interest could be put into the mortgage, and treating it that way, he did not owe any interest when he made the tender; that he did not owe the defendant anything toward taxes; that he had paid him more than enough to meet them; and that he could not say how much the defendant was indebted to him for over-payments, but it was considerable."

On this evidence the presiding judge refused to direct a verdict for the defendant. He instructed the jury, among other things, that before the plaintiff was entitled to a deed he was bound to pay the taxes and interest on the $35,250; that if on February 21, 1902, the plaintiff had not paid the defendant sufficient money including the rents collected after January 24,

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1902, to pay the taxes and interest accrued on February 21, 1902, he could not recover.

He further instructed the jury that if there was an oral agreement as to advances for the sixth house, as the plaintiff asserts, and when he went to the defendant on February 21, 1902, he was "ready and willing to give the mortgage as he had agreed to give it, and upon an accounting with the defendant to give a mortgage for the sum that should be found due, and the defendant refused to have any arrangement with him, — to make any accounting with him, — then the plaintiff would be entitled to recover, if he had been ready and willing on his part to perform the agreement which he had made." To this part of the charge the defendant took an exception.

The first contention made by the defendant's counsel in support of these two exceptions is that the rights of the plaintiff under the bond were terminated before the tender of February 21, 1902.

In support of this contention he relies upon the concluding clause in the defendant's bond, which is in these words: "And it is expressly provided and agreed that upon failure by the obligee to perform the aforesaid conditions in regard to the payment of interest, taxes, and assessments, and in regard to insurance, waste and liability, the obligor may take possession of the premises and collect for his own use the rents and profits thereof, and this obligation shall be absolutely void."

No such contention appears to have been made at the trial. If the point had been taken at the trial, it would have been a question for the jury whether the defendant took possession under this clause of the bond. The jury could not find that he did enter under that clause without finding that the plaintiff's testimony as to the conditions under which the defendant took possession was not true.

It is not necessary to go further, but it ought to be pointed out that the clause here relied on by the defendant is a clause by which valuable rights of the plaintiff would be forfeited by the defendant's acting under it, and therefore it is one against which equity would give relief on compensation being made within a reasonable time; see for example *Gordon* v. *Richardson*, 185 Mass. 492, and cases cited; and this would have governed the

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rights of the parties when they met on February 21, 1902, and the accounting which the plaintiff was ready to take up had this power been taken by the defendant.

The defendant's next contention is that the plaintiff had failed to pay the taxes on the land and interest on the advances for the sixth house. So far as the unpaid taxes are concerned the jury, under the charge of the presiding judge, could not find for the plaintiff without finding that the defendant had been put in funds by the plaintiff to pay those taxes and that interest.

The defendant never had asked for an accounting to fix the amount to be secured by mortgage for advances on the sixth house, and until that was done no interest on that sum could be said to be in default. It would seem pretty clear that the reason for the defendant's putting this off was because he had not discharged, and did not wish to discharge, the attachments as he had agreed to do.

The last argument is that there is no evidence that the plaintiff's willingness to give the other mortgage ever was communicated to the defendant. On the evidence already stated we are of opinion that the jury were warranted in finding that it was impliedly, if not expressly, communicated to him.

Exceptions overruled.

ABERTHAW CONSTRUCTION COMPANY *vs.* C. W. CAMERON & others.

Suffolk. December 8, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Unlawful Interference. Equity Jurisdiction, To enjoin conspiracy. *Conspiracy. Labor Union. Corporation. Equity Pleading and Practice,* Decree.

A corporation may be enjoined from conspiring with others to interfere unlawfully with the performance of a contract and may be held liable in damages for such interference in the same way and to the same extent that a natural person may be.

In a suit in equity by a contractor to enjoin the officers and members of a labor union from conspiring to compel the plaintiff, by threats of causing a strike of his employees, to employ only union men in certain work constituting part

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of the construction of a church under a contract between the plaintiff and a corporation, called a board of directors, which was one of the defendants, and for the assessment of damages caused by the illegal acts of the defendants, it appeared that the defendants other than the corporation conspired in the manner charged in the bill before they were aided by the defendant corporation, that this defendant was informed by one of the other defendants that a general strike was proposed if the plaintiff continued to employ a certain non-union workman, that the members of the board, which constituted the defendant corporation, had an interview with the plaintiff in which they requested him either to discharge the non-union workman or to procure employment for him elsewhere or to permit them to do so, and that they did this to avoid a general strike which they deemed probable if the workman was permitted to remain and which if it occurred would delay the completion of the church, that about a week later the defendant corporation voted to request the plaintiff to cease work as it had decided to finish the building in another way, and communicated this vote to the plaintiff, and that the plaintiff was ejected from the church and prevented from continuing the performance of his contract. *Held*, that the vote of the defendant corporation and its communication to the plaintiff, followed by the breaking of the contract, warranted a finding that the defendant corporation participated in an unlawful conspiracy to compel the plaintiff to employ only union workmen, and that in pursuance of such conspiracy the defendants caused a breach of the contract between the plaintiff and the defendant corporation without any just cause or lawful provocation; but that a finding was warranted that the defendant corporation did not participate in such conspiracy by the previous interview of the members of the board with the plaintiff, which was advisory only and was not intended to aid in the coercive measures or active interference adopted by the other defendants.

In a suit by a contractor to enjoin the officers and members of a labor union from conspiring to compel the plaintiff, by threats of causing a strike of his employees, to employ only union men in certain work constituting part of the construction of a building under a contract between the plaintiff and the owner of the building and for the assessment of damages caused by interference with the plaintiff's performance of his contract, a temporary injunction issued and thereupon the plaintiff completed his contract before the case was ripe for a final decree. The case came before a single justice upon a master's report which was founded upon the plaintiff's bill and dealt only with the unlawful acts of the defendants in connection with the contract described in the bill. The master found for the plaintiff and the single justice ordered that the master's report be confirmed. The plaintiff in applying for a final decree asked for a permanent injunction restraining the defendants from any interference in the future in case the plaintiff in the performance of other contracts should employ non-union workmen. The justice ruled that the injunction should apply only to the contract set forth in the bill, which had been completed by the plaintiff, and to no other work. He reported the case to the full court, stating in his report that all questions of pleading were waived, and also stating that such decree was to be entered on the master's report as law and justice required. *Held*, that the ruling confining the decree to the issues heard and passed upon by the master and the single justice was correct.

BILL IN EQUITY, filed in the Supreme Judicial Court on February 23, and amended on February 28 and March 8, 1906, by a

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corporation, organized under the laws of the State of Maine and having its usual place of business in Boston, against the business agent, the president, the vice-president, the secretary and the treasurer of the Carpenters District Council of Boston and Vicinity, a voluntary association, and against the same persons individually and as members of that association, and against the members of a committee of that association, against certain other persons individually and as officers of another voluntary association known as the Building Trades Council, against the Christian Science Board of Directors, "a corporation duly organized according to law, of said Boston," and against the secretary and two other members of that corporation individually and as agents of the corporation, to enjoin the defendants other than the defendant corporation from inducing that defendant to break its contract with the plaintiff under which the plaintiff had agreed to construct and to complete by March 12, 1906, a concrete floor in the auditorium and corridors of a structure known as the First Church of Christ, Scientist, on Falmouth Street in Boston, to enjoin the defendant corporation from breaking such contract, and to enjoin all the defendants from interfering by threats, intimidation or coercion with any of the persons employed by the plaintiff and from combining and conspiring to compel the plaintiff in the prosecution of its business to employ only members of the Carpenters District Council or of any other union and to discharge any persons in its employ who were not members of such union or of any other labor union, praying for a temporary and a permanent injunction and for an assessment of damages.

The case was referred to Wade Keyes, Esquire, as master. He filed a report in which he found for the plaintiff. Later the case was heard upon the master's report and the defendants' exceptions thereto by *Sheldon*, J., who overruled all the exceptions except one, which is described below, and reported the case for determination by the full court as follows:

"This case came on for hearing upon the filing of the master's report and the exceptions of the defendants thereto. I overruled all the exceptions except the second exception of the defendant Christian Science Board of Directors.

"The plaintiff contended that the defendant Christian Science

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Board of Directors became a co-conspirator with the other defendants from the time when they first sought to induce the plaintiff to discharge the workman Stark. Against the plaintiff's objection I ruled that the Christian Science Board of Directors became co-conspirators only on its overt act in breaking its contract with the plaintiff on Wednesday, February 21, 1906, and therefore sustained the second exception so far as the same applies to the item of $15.12, cost of reinstating work destroyed, and $3.13, cost of advertising in the public press, said items of damage having accrued before said breach of contract. Thus modified I ordered the master's report to be confirmed.

"The plaintiff asked for a permanent injunction in the following form:

"'That the following respondents named in said bill, to wit, the Carpenters District Council of Boston and Vicinity, and each and every member thereof, C. W. Cameron, W. D. McIntosh, S. F. McArthur, H. M. Taylor, J. E. Potts, J. F. Medland, John McLeod, and Patrick Slow, individually and as officers and agents of said Carpenters District Council, and the Christian Science Board of Directors, and the servants, agents, confederates and attorneys of each of the foregoing persons, associations and corporations, and all others who may act in concert with them or by their direction, be, and they hereby are, perpetually restrained and enjoined from combining and conspiring to compel said complainant in the prosecution of its business to employ members of said Carpenters District Council or of any other labor organization so called, and to refrain from employing any person or persons who may be non-union men so called; and said respondents, their servants, agents, confederates and attorneys are further enjoined and restrained, for the purpose of compelling the complainant to employ exclusively in the transaction of its work and business members of said Carpenters District Council or of any other labor union, from breaking or combining or conspiring to break, or causing to be broken, any contract or contracts which the complainant may now or hereafter have, either with any of the defendants herein or with any other person or corporation whatsoever; and for said purpose from directly or indirectly calling or combining or conspiring to call or cause a strike of workmen or a cessation of work by

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workmen now employed or hereafter to be employed by the complainant in the transaction of its business, and for such purpose from interfering by threats, intimidation, or coercion, or any other obstructive action, with any of the persons now employed or whom said complainant may hereafter seek to employ in the transaction of its business, and for said purpose from combining and conspiring to interfere with the said complainant in the practice and prosecution of its occupation and business, and to prevent or obstruct it from obtaining further contracts therefor and employment therein, or from securing the services of workmen to carry out such contracts.'

"The defendants other than the Christian Science Board of Directors objected to any injunction which should apply to any part of the plaintiff's business except the particular work being done by the plaintiff under contract with the defendant Christian Science Board of Directors, which work was completed on March 12, 1906. Against the plaintiff's objection I ruled that the injunction should apply only to said work, and not to other work.

"No question is made that the bill as to the defendants William B. Johnson, Charles Brigham, Charles C. Coveney, John Doe and Richard Roe, and the Building Trades Council should be dismissed without costs.

"All questions of pleading are waived.

"At the request of the plaintiff I report the case to the full court, such decrees to be entered as, on the master's report, law and justice require."

G. W. Anderson, (*E. H. Ruby* with him,) for the plaintiff.

F. W. Mansfield, for the defendants other than the Christian Science Board of Directors.

BRALEY, J. The plaintiff's bill prays for injunctive relief, and the assessment of damages against the defendants who are alleged to have formed a conspiracy to compel it under penalty of a general strike of its employees to hire only union workmen in the erection of a large building then in process of construction under its contract with the Christian Science Board of Directors, one of the defendants. Upon the principal question, the master to whom the case was referred found in favor of the plaintiff, and his report was confirmed except as to the time when this

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defendant became a party to the conspiracy. By the modification of the single justice it was held that it did not unlawfully participate until February 21, 1906, when the board voted to request the plaintiff to cease work as they had decided to finish the building in another way. The master not only finds that this action was taken and communicated to the plaintiff, who refused compliance, but that on February 15, 1906, after having been informed by the defendant Cameron that a general strike was proposed if the plaintiff continued to employ one Stark, who did not belong to either of the unions, the members of the board had an interview with the plaintiff. In this interview they requested the plaintiff either to discharge Stark, or procure employment for him elsewhere, or permit them to do so, and this action is found to have been taken to avoid a general strike which they believed probable if he was permitted to remain. By the pleadings and in the report this defendant is described as a corporation known as the Christian Science Board of Directors, and there is no statement or finding that this body was representative rather than original, or that the authority of the board if treated as the corporation itself was limited by any by-law or vote. The conspiracy charged and proved was a combination to coerce the plaintiff to accede to the demands of Cameron and the organizations named as defendants, in which this defendant joined. Being a body corporate gave it no immunity from the consequences, for which it could be held liable as if it had been a natural person. *White* v. *Apsley Rubber Co.* 194 Mass. 97, and cases cited. *Buffalo Lubricating Oil Co.* v. *Standard Oil Co.* 106 N. Y. 669. But while in a conspiracy at common law an overt act need neither be alleged nor proved, as the offence consists in the unlawful combination, there must be a mutual understanding whereby all the conspirators work together for a common end. *Commonwealth* v. *Hunt*, 4 Met. 111. *Commonwealth* v. *Eastman*, 1 Cush. 189, 224. *Revere Water Co.* v. *Winthrop*, 192 Mass. 455. The plans of the other defendants were well on foot when this defendant who had been informed of their object intervened, and sought by its representations to persuade the plaintiff to avoid all future difficulty, by discharging an employee who had not become obnoxious to the corporation, except by reason of its pecuniary interest that there should be no

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unreasonable delay in the completion of its church. The master did not report the evidence, and the usual rule applies. But beyond this special finding he made no further finding as to the conduct of the members of the board before the vote was taken. It is plain that the interview with the accompanying proposals was advisory only and not intended to re-enforce or aid in the coercive measures adopted by the unions and their representatives, or to form a part of the measures of active interference which the other defendants were taking to enforce their demand. The ruling that the proposals made at this conference did not make them co-conspirators by participation therefore must be sustained.

In the general scheme of the conspiracy the breaking of the contract * which subsequently followed was an important element, and when taken in connection with the action of the other bodies of which the board had knowledge, the concluding finding that the defendants against whom this bill is prosecuted "conspired together to compel the plaintiff to employ only union carpenters" and "that in pursuance of such conspiracy they caused a breach of the existing contract of employment between the plaintiff and the defendant board, without any just cause or lawful provocation" was well warranted. *Walker* v. *Cronin*, 107 Mass. 555. *South Wales Miners' Federation* v. *Glamorgan Coal Co.* [1905] A. C. 239, 250, 253.

The remaining question relates to the form and scope of the decree. An interlocutory injunction having issued under the first prayer of the bill, the plaintiff fully performed its contract,

* The vote of the defendant corporation was communicated to the plaintiff in a letter from the architect of the corporation, found by the master to have been its agent for the purpose. This letter contained the following sentence: "I am instructed by the Directors of the First Church of Christ, Scientist, to inform you that it is their wish that you retire immediately from the work at the First Church of Christ, Scientist. It has been decided by them to do the remainder of the work included in your contract in a different manner, commencing at one o'clock today."

About twelve o'clock on the same day the agent of the defendant corporation ordered the plaintiff to leave the job, and, upon its refusal to do so, this agent called the watchman employed by the directors to police the building, who forcibly, but without actual physical violence, ejected the foreman of the plaintiff from the job and escorted him to the street, and the men employed by the plaintiff followed.

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completing the work more than two months before the case appears to have been ripe for the entry of a final decree. The plaintiff is not content with a decree in which relief is confined to the unlawful acts of the defendants in connection with the contract described in its bill, but asks for a permanent injunction restraining the unions and their officers from any interference in the future if the plaintiff in the performance of other contracts chooses to employ non-union workmen. To this proposition the answer is plain. By the terms of the report under which the case is before us while it is stated that all questions of pleading are waived, it is also stated, that such decrees are to be entered on the master's report as law and justice require. The master's report rests upon the frame of the bill with which it must be considered, not only for the purpose of the modification, but as to the extent of the relief to which the plaintiff is entitled. This issue was not presented by the pleadings, and consequently it neither has been heard and determined by the master nor by the single justice. If the pleadings are disregarded it would be equally extraordinary to enter such a decree upon the report of a master to whom this question was not referred, and upon which he has not passed. The conspiracy in which the defendants are found to have participated was an unjustifiable wrong causing temporary damage. *Martell* v. *White*, 185 Mass. 255. But while unlawful conduct has been proved in the present case, this fact raises no presumption that in the future the defendants will engage in similar wrongful acts. *Hatch* v. *Bayley*, 12 Cush. 27, 30. *Phelps* v. *Cutler*, 4 Gray, 137. *Stewart* v. *Thomas*, 15 Gray, 171. *Baldwin* v. *Parker*, 99 Mass. 79. *Kline* v. *Baker*, 106 Mass. 61. And if such a combination exists it must be pleaded and proved before appropriate relief can be granted. See *Plant* v. *Woods*, 176 Mass. 492, 496, 497; *Reynolds* v. *Everett*, 144 N. Y. 189. The plaintiff is entitled to a decree with costs confirming the master's report as modified, awarding execution for the damages assessed less the diminution thus caused, and the injunction heretofore issued may be made perpetual if it desires.

Ordered accordingly.

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NATHAN P. REED, administrator *de bonis non* with the will annexed, *vs.* NATHAN H. REED, executor, & others.

Middlesex. December 4, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Devise and Legacy. Words, "Property."

The will of a testatrix disposed of her property as follows: "I give, devise, and bequeath to my sister E. all my real estate, and personal property, for and during her natural life: with the privilege of disposing of any, or all, of said real estate, if she should at any time deem it expedient to do so. At her decease the property to be equally divided as follows: one third to my brother J., or his heirs; one third to my brother F., or his heirs; one third to the children of my lately deceased sister M." *Held*, that E., the sister of the testatrix, took a life estate with a power of disposal of the real estate during her life, that the other beneficiaries took vested remainders subject to be divested if the power was exercised, and that the word "property" used to describe the residue meant whatever was left at the death of the tenant for life.

BILL IN EQUITY, filed in the Probate Court for the county of Middlesex on March 20, 1906, by the administrator *de bonis non* with the will annexed of the estate of Sarah Baldwin, late of Billerica, for instructions.

The bill prayed for the construction of the will upon the following questions:

1. Whether or not the personal estate was absolutely bequeathed to Elizabeth C. Baldwin therein mentioned, or whether she took only a life interest therein with power of disposition.

2. Whether or not the devise of the real estate to Elizabeth C. Baldwin was in fee, or whether she was given a life estate with power of disposition thereof.

3. Whether or not the real and personal estate of Sarah Baldwin, remaining at the decease of Elizabeth C. Baldwin, was the property and estate of Sarah Baldwin and should be administered by the plaintiff and accounted for by him as administrator of her estate with the will annexed.

In the Probate Court *McIntire*, J. made a decree that by the terms of the will Elizabeth C. Baldwin took only a life estate in the real and personal property bequeathed to her, with the privilege of disposing of any or all of the real estate during her life,

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that whatever of the real estate remained at her decease was the absolute property of those persons to whom it was devised by the will, and that the personal estate should be distributed among the same persons in the proportions named in the will.

Clara B. Reed, one of the defendants, appealed.

The case came on to be heard on appeal before *Sheldon*, J., who at the request of the defendant Clara B. Reed reserved it upon the bill and answer for determination by the full court.

The case was submitted upon a brief by

F. A. P. Fiske, for Clara B. Reed.

BRALEY, J. In her will Sarah Baldwin made this provision: "I give, devise, and bequeath to my sister Elizabeth C. Baldwin, (should she be living at my decease,) all my real estate, and personal property, for and during her natural life: with the privilege of disposing of any, or all, of said real estate, if she should at any time deem it expedient to do so. At her decease the property to be equally divided as follows: one third to my brother John Baldwin, or his heirs; one third to my brother Francis Baldwin, or his heirs; one third to the children of my lately deceased sister Mary B. Parker, should the minor children (Charles W. or Lucy B. Parker) decease before becoming of age, their share to be equally divided between the others." The questions are whether the legatee and devisee first named took the property absolutely, or only a life estate with a power of disposing of the remainder in the real estate. It would hardly be possible to conceive of more direct language to express her purpose than that chosen by the testatrix in the first sentence of the clause. The gift is of "all my real estate, and personal property," and the tenure is "for and during her natural life," coupled with an unlimited power of disposal by deed if the devisee for any reason deemed it expedient to convert the real estate. A life interest in the estate as a whole having been given with a power to convey, the word "property" in the second sentence should be construed as including whatever might remain at the death of the tenant for life. Under this construction the limitation over is not repugnant, but consistent with the object of the testatrix, which evidently was to provide for the comfortable support of her sister, even if the whole of the property might be exhausted, but if a residue remained it was to

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go to her other relatives in the proportions named. The case, therefore, is not within *Bassett* v. *Nickerson*, 184 Mass. 169, and *Martin* v. *Foskett*, 189 Mass. 368, but is governed by *Whitcomb* v. *Taylor*, 122 Mass. 243; *Johnson* v. *Battelle*, 125 Mass. 453; *Kent* v. *Morrison*, 153 Mass. 137; *Collins* v. *Wickwire*, 162 Mass. 143; and *Dana* v. *Dana*, 185 Mass. 156, 158. If at the death of the tenant for life any of the personalty remained it should be turned over to the petitioner as administrator with the will annexed, and as it does not appear that the realty has been converted, the title which vested at the death of the testatrix has not been divested, and is in the remaindermen, if living, or if dead in their heirs or devisees. *Cushman* v. *Arnold*, 185 Mass. 165. *Dana* v. *Dana*, 185 Mass. 156, 160.

Decree of the Probate Court affirmed.

ALMA CHAPUT, administratrix, *vs.* HAVERHILL, GEORGETOWN AND DANVERS STREET RAILWAY COMPANY.

Essex. December 10, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Evidence, Declarations of deceased persons. *Negligence. Street Railway.*

At the trial of an action at common law by an administratrix against a street railway company to recover for personal injuries of the plaintiff's intestate resulting in his death caused by the alleged negligence of the defendant's servants, the declarations of the intestate describing the accident are admissible under R. L. c. 175, § 66, although the defendant thus is deprived of the advantage of a cross-examination by which to test the accuracy of the statements or to obtain admissions in support of its own theory of the accident.

It is not negligence as matter of law to drive a large team on a dark night along the tracks of a street railway down a steep grade of a highway. One so driving has a right to assume that the motorman of a car approaching from behind will remember and recognize the use of the street by travellers and will exercise reasonable care to avoid running them down.

In an action at common law by an administrator against a street railway company to recover for personal injuries of the plaintiff's intestate resulting in his death caused by the alleged negligence of the defendant's servants, if there is evidence that the plaintiff's intestate, at about eleven o'clock on a dark but pleasant night, was driving an ordinary large job wagon along the track of the defend-

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ant's railway upon a public way, that he was seated upon the floor of the wagon with the reins in his hands, that he looked back, and, neither seeing an approaching car nor hearing any gong, kept on, when without any warning a car of the defendant ran into the back of his wagon, throwing him out and causing the injuries sued for, the question of the due care of the plaintiff's intestate is for the jury, and it is for them to say whether, after looking back and neither seeing nor hearing an approaching car, he should have taken further precautions before keeping on upon the defendant's track.

TORT, by the administratrix of the estate of Roch Chaput, to recover for his death and conscious suffering, with three counts, the first and second under R. L. c. 171, § 2, and c. 111, § 267, for causing the death of the plaintiff's intestate, and the third at common law for his personal injuries and conscious suffering caused by the alleged negligence of the defendant's servants. Writ dated October 25, 1901.

At the trial in the Superior Court *Gaskill*, J. refused to order a verdict for the defendant, and submitted the case to the jury. The jury found for the defendant on the first and second counts, and returned a verdict for the plaintiff on the third count in the sum of $2,000. The defendant alleged exceptions.

The case was submitted on briefs.

C. H. Poor & E. B. Fuller, for the defendant.

T. W. Coakley, D. H. Coakley & R. H. Sherman, for the plaintiff.

BRALEY, J. At about eleven o'clock on a dark but pleasant night, the plaintiff's intestate while driving "an ordinary large sized job wagon" along a public way in which the defendant's track was located was thrown out by a car running into the rear end of the wagon, and suffered injuries which caused his death after a period of conscious suffering. The jury found for the plaintiff on the third count of the declaration, and the defendant urges that the refusal to direct a verdict in its favor was erroneous as there was no evidence of the decedent's due care. Having died before the action was brought his declarations became admissible, and were put in evidence by the testimony of his brother, and the plaintiff, who is his widow. R. L. c. 175, § 66. *Dickinson* v. *Boston*, 188 Mass. 595. Upon these declarations and other descriptive evidence of the grade of the street, the speed of the car, and the character of the collision, the jury could find that at the time of the accident the wagon being on the

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right hand side of the road was partly on or near the track, with the decedent seated upon the floor, with the reins in his hands, and that upon looking back and neither seeing an approaching car, nor hearing a gong he kept on, when without any warning the car ran into the rear end of his wagon, throwing him into the highway, where he fell receiving severe injuries. It is true that the defendant was deprived of the advantage of cross-examination by which to test the accuracy of his statements, or to obtain admissions in support of its theory that he was sitting crosswise back of the seat with the reins hung on the left hand side of the wagon, nevertheless by force of the statute this testimony was competent, and its weight was for the jury, who were not obliged to accept the version of the affair as described by the defendant's witnesses. It often has been decided that the use by a street railway of the highway in which its tracks may be located is not exclusive, nor are travellers at their peril obliged to act as if this right existed, under the penalty that if they are injured they must be held as matter of law to have been careless. *O'Brien* v. *Blue Hill Street Railway*, 186 Mass. 446, 447, and cases cited. *Kerr* v. *Boston Elevated Railway*, 188 Mass. 434, 436. The wagon and the car were both rightfully upon the highway, and if the wagon could leave the track while the car could not, yet the defendant's motorman was called upon in passing down a steep grade to remember and recognize the use of the street by travellers, and to avoid running them down, if they happened to be wholly or partially within the rails, or so near the track that there might be danger of contact. The decedent had a right to assume that at least this degree of care would be exercised. *Hennessey* v. *Taylor*, 189 Mass. 583. If the jury found that he looked back, and neither seeing nor hearing an approaching car kept on, it was for them to decide whether his conduct was that of the ordinarily prudent man similarly situated, or whether he should have taken further precautions. *Stubbs* v. *Boston & Northern Street Railway*, 193 Mass. 513. In its essential features the present case cannot be distinguished from the cases of *Vincent* v. *Norton & Taunton Street Railway*, 180 Mass. 104; *Sexton* v. *West Roxbury & Roslindale Street Railway*, 188 Mass. 139; *Shea* v. *Lexington & Boston Street Railway*, 188 Mass. 425; and *Kerr* v. *Boston Elevated Railway*, 188 Mass. 434, by which

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it is governed rather than by the case of *Gorham* v. *Milford, Attleborough & Woonsocket Street Railway*, 189 Mass. 275, on which the defendant relies.

Exceptions overruled.

CHARLES M. LOYNES *vs.* LORING B. HALL COMPANY.

Middlesex. December 10, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence.

An experienced workman in a shoe factory employed to run a machine for shaving or trimming heels assumes the risk of an injury caused by the "veneering" put in between the sole of a shoe and the upper being harder than usual, the degree of hardness depending on the amount of water absorbed by the veneering when "tempered," this being an obvious risk incident to his employment, and he none the less assumes this risk if three or four days before suffering an injury from this cause he complained to the foreman of his employer that the veneering used was not of proper stock and the foreman explained that this was because the regular stock had run out and that the trouble would be over as soon as the temporary stock was exhausted, and the temporary stock had been exhausted and "the shoes came all right" until the accident happened.

TORT for personal injuries received by the plaintiff on August 29, 1904, while working on a heel shaving or trimming machine in the shoe factory of the defendant at Marlborough. Writ dated November 18, 1904.

In the Superior Court *Hitchcock*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions. At the time of the accident, the plaintiff, who was fifty-two years of age, had been working at the shoe business for twenty years, and for about two or three years had worked on a machine similar to the one on which he was working when injured. He was shaving a heel by pressing it against the revolving knife on the machine when a hard piece of "veneering" threw off the heel from the knives on the machine and caused the plaintiff to cut his thumb. The plaintiff's description of the accident is quoted in the opinion.

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J. J. Shaughnessy, (*F. P. O'Donnell* with him,) for the plaintiff.

J. Lowell & G. McC. Sargent, for the defendant.

LORING, J. The plaintiff was employed by the defendant, who was a shoe manufacturer, to run a McKay heel shaving or trimming machine. The only description given in the bill of exceptions is included in the following testimony of the plaintiff: "There were two knives for shaving the main part of said heel and two more knives known as rand cutters which are on a spring for cutting a part of said heel near the upper of the shoe, and that the shoe came to him with the sole and heel on it just as the sole was sewed and the heel nailed on the machine; that the sole and shank were also on the shoe when he got it, and for the purpose of raising the shank it was necessary for the defendant to put in a small piece of leather between the shank of the shoe and the upper, on both sides of the shoe, and this small piece was fastened to the shoe and extended the full length of the shank and it came back to the front edge of the heel, and the shoes with the upper sole shank and heel were furnished to him by the defendant." Three or four days before the accident the plaintiff complained to the foreman of the room in which he worked that the veneering put in between the sole and the upper was not made of proper stock; that it was larger and longer than usual and extended back "about an inch over the front of the heel and interfered with the plaintiff's shaving the heel." The foreman explained that the reason for this veneering having been used was that the defendant being out of regular stock had borrowed this from a neighbor, and stated that as soon as he had run off the shoes on which the borrowed stock had been used "the shoes would come all right." The plaintiff further testified that in three or four hours he ran off the borrowed stock "and then the shoes came all right." He also testified that "about two or three days from the time he complained he struck a shoe which seemed harder, and there was a piece of large, hard veneering in the shank of the shoe that extended back beyond the front of the heel, and as soon as it came in contact with the knives the large, hard piece of veneering threw off the heel from the moulding knives on said machine, and caused the plaintiff to cut his thumb; that the leather

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on the shoe he got hurt on was harder; that usually, the day before, the leather is put in water and tempered more or less; that some, of course, absorb more water, some less, and some the water won't affect at all."

The plaintiff was an experienced workman and had been working on a machine similar to the one in question for two or three years; and he testified that he did not need "any instructions." It was admitted that the light in the room in question was good.

On this evidence the presiding judge directed a verdict for the defendant, and the case is here on an exception to that ruling.

All that the plaintiff complains of is that the veneering in the shoe in question was harder than usual. The plaintiff himself testified that the veneering was more or less hard as it absorbed more or less water when "tempered" "the day before," and that some veneering "the water won't affect at all." The risk coming from the veneering's being more or less hard was an obvious one, incident to the employment which the plaintiff undertook. The defendant's duty to the plaintiff was not increased by the conversation had a few days before between the plaintiff and the defendant's foreman if (which is by no means clear) the veneering in question was not what the foreman assured the plaintiff he might expect in the future.

Exceptions overruled.

JOHN HAYES *vs.* FRANK D. WILKINS.

Suffolk. December 10, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Agency. Master and Servant. Negligence.

A driver employed by a teamster who, after having completed his regular work for the day, is driving back to his employer's stable by a route which is not the shortest but which he chooses because the shortest route is blocked by teams, is acting within the scope of his employment, and if on the way he goes into a pool room to get some tobacco, negligently leaving the horse unhitched and unattended, and the horse runs away and injures a person lawfully on the highway, the employer of the driver is liable for the injuries thus caused.

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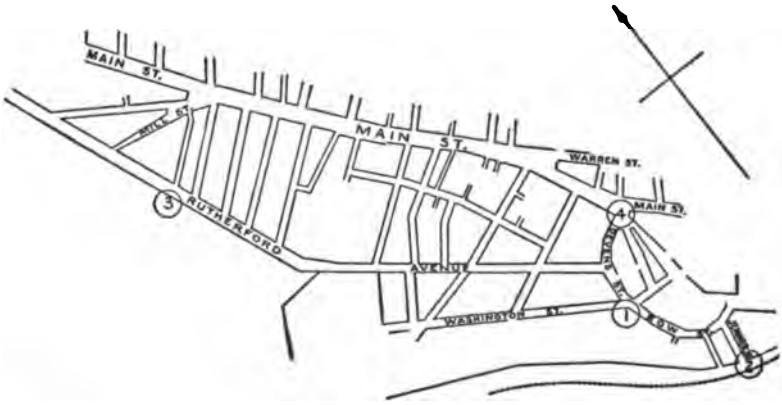
If a servant while driving the horse of his master within the scope of his employment negligently leaves him standing unhitched and unattended in order to enter a building upon an errand of his own, and the horse runs away and injures a person lawfully upon the highway, the negligence of the servant in leaving the horse while in his charge is the direct and proximate cause of the injury and his purpose in entering the building, which remotely caused the accident, is immaterial.

TORT for personal injuries from being knocked down by a runaway horse belonging to the defendant, at about five o'clock in the afternoon of November 21, 1902, while the plaintiff was lighting a lantern at the corner of Washington Street and Bow Street in that part of Boston called Charlestown to warn travellers of obstructions incident to the erection of a building which the plaintiff was superintending as a carpenter. Writ dated January 12, 1903.

In the Superior Court the case was tried before *Bishop*, J. The following is a reduced copy of a plan annexed to the record.



The defendant was a truckman or teamster maintaining a stable on Front Street at the corner of Jenner Street at the point marked 2 on the plan. He ran four or five teams that year, and his business consisted in part of delivering merchandise to the Western Division of the Boston and Maine Railroad at its freight depot on Rutherford Avenue, a street shown on the plan. One Current was a driver of a team in the employ of the defendant, and on the day in question he had been directed by the defendant, or the foreman, to go to the market

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and get some cases of eggs and deliver them at the freight station. Current got the eggs and delivered them at the point marked 3 on the plan. This was his last work for the day, except to return to the stable. Instead of turning to the right and going to the stable in that direction through Rutherford Avenue, Current drove the team to the left on Rutherford Avenue to Mill Street, followed Mill Street to Main Street and went down Main Street to the corner of Main and Devens Streets, where he stopped the team at Melvin and Shaw's pool room at the point marked 4 on the plan, got off his team, and, leaving the horse unattended, went into the pool room and asked the proprietor for a piece of tobacco, and received it. While he was in the pool room the horse ran down Devens Street to the corner of Bow Street and Washington Street, and the accident occurred at the point marked 1 on the plan. These facts were not disputed.

Current testified that Rutherford Avenue was the shortest route in length, but that night it was not the shortest route "on account of so many teams coming up there it was all blocked, and the other streets were clear." He also testified that when he stopped at the pool room the horse was headed in the general direction of the stable.

There was evidence, not controverted, that the plaintiff was in the exercise of due care.

The defendant contended that Current at the time of the accident was engaged in an affair of his own, namely, getting tobacco for himself in the pool room. The plaintiff contended that Current was acting within the scope of his employment by the defendant, and also contended that the defendant was liable because he had entrusted a horse to Current which he knew or should have known was vicious and likely to run away.

At the close of the evidence, the judge ruled that the proximate cause of the accident was the fact that the horse was left unattended in a place to which Current had gone; that he had left the horse to go upon an errand of his own not connected with the business of the defendant; and that upon the authority of *McCarthy* v. *Timmins*, 178 Mass. 378, the driver of the team was not acting within the scope of his employment when he went to and into the pool room, leaving the horse unattended; and further ruled that if the defendant knew that his men previ-

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ously had gone off on errands of their own without censure, such knowledge would not give authority to Current to repeat the act as a part of his duty to the master, or bring it within the scope of his employment, and that the evidence introduced to show that the horse was of a vicious character would not affect this conclusion.

The judge ordered a verdict for the defendant, and reported the case for determination by this court. If the rulings of the judge upon the whole evidence were right the verdict was to stand, unless the evidence offered and excluded should have been admitted and might affect the result. If the rulings upon the whole evidence were wrong, or if the judge erred in excluding the evidence of a habit of drivers to leave their horses for their own purposes with the knowledge of the defendant, the verdict was to be set aside and the case was to stand for trial.

W. A. Buie, (*J. R. Murphy* with him,) for the plaintiff.

W. H. Hitchcock, (*W. I. Badger* with him,) for the defendant.

KNOWLTON, C. J. The plaintiff was struck and injured by a horse and wagon belonging to the defendant. The horse was running away, and there was evidence from which the jury might have found that the defendant's driver was negligent in leaving the horse unhitched and unattended, knowing that it was unsafe so to leave him. It was undisputed that the plaintiff was in the exercise of due care, and the principal question is whether there was evidence that the driver was acting within the scope of his employment when he left the horse.

He was on the way to the defendant's stable, after having completed the regular work for the day by delivering some merchandise at a freight house. While the route that he took was not the shortest, it was but little longer than the other, and the jury might have found that he chose it because the other was blocked by teams, and that therefore he was within the scope of his employment up to the time when he left the horse. He went into a pool room to get some tobacco, and this movement, treated as an independent act, was not for the master's benefit, nor within the scope of his employment as a servant. But his custody of the horse, up to the time that he left him, was in the performance of the defendant's business, and any negligence in maintaining that custody was negligence for the consequences

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of which the defendant is liable. While he had the horse in custody for his master, and was charged with the duty of continuing this custody as a servant, he negligently omitted to continue it, and as a consequence the horse ran away. His purpose in going into the pool room is immaterial. His negligence occurred while he was directly engaged in his master's business, by the mere omission of that which he should have done in the business. If the attempt were to charge the master for negligence in the performance of the act of going to buy tobacco, the case would be different. If the driver had carelessly injured property in the pool room the defendant would not be liable, because his going into the pool room, considered as a positive act, was not within the scope of his employment. But the omission and failure to continue the proper custody of his horse when he had him in custody for the master, was an omission to perform his duty as a servant while he was acting for his master. This omission, quite apart from the purpose which accompanied it, was a direct and proximate cause of the plaintiff's injury.

The case is different from *McCarthy* v. *Timmins*, 178 Mass. 378, in which the driver, for his own purposes, had driven the team away from the streets on which he should have driven it for his master, and had ceased to act within the scope of his employment before the negligent omission that caused the accident.

On this part of the case we are of opinion that there was evidence for the jury. We discover no error in the other rulings at the trial.

Verdict set aside.

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CITY OF WORCESTER *vs.* WORCESTER AND HOLDEN STREET RAILWAY COMPANY.

Worcester. December 11, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Municipal Corporations. Street Railway. Contract, Validity. *Pleading, Civil,* Answer. *Corporation, Ultra vires.*

Since the enactment of St. 1898, c. 578, the board of aldermen of a city or the selectmen of a town in granting a location to a street railway company cannot impose a condition that the company shall at all times maintain the pavement between its rails and tracks and for a space of eighteen inches outside thereof in good order and repair.

Whether under St. 1898, c. 578, § 18 (R. L. c. 112, § 7), the board of aldermen of a city in granting a location to a street railway company may not impose a condition that if in the construction of the tracks of its railway it shall become necessary in the judgment of the city engineer to widen the wrought part of, change the grade of or make general or specific repairs upon the whole or any portion of the streets where the tracks are laid, such work as the city engineer may direct shall be done at the expense of the railway company, *quaere.*

In July, 1901, the board of aldermen of a city in granting a location to a street railway company imposed a condition that the company should at its own expense and cost pave with block paving between the rails and tracks, and for a space eighteen inches outside thereof, and should maintain such pavements at all times in good order and repair. The street commissioner and the mayor in behalf of the city made an agreement with the street railway company that on a certain street to which the requirement applied it would be better for every one concerned to have macadam used instead of block paving outside the rails, that the city should do the work of macadamizing and that the railway company should pay for it a stipulated price. The city did the work in accordance with the agreement and brought an action of contract against the railway company for the stipulated price. *Held,* that, irrespective of the validity of the condition imposed by the grant of location, the contract was a valid one which the parties had a right to make, and, even if the authority of the street commissioner and the mayor to represent the city had been disputed, which it was not, the bringing of the action was a ratification equivalent to an original authority.

Whether in an action on a contract the defence that the contract is invalid is open under an answer containing only a general denial, here was not considered because the contract sued upon was held to be valid.

Whether one who owes money to a corporation under the terms of a contract which the corporation fully has performed, when sued upon the contract, can set up the defence that it was *ultra vires*, here was not considered because the contract was held to be within the corporate powers of the plaintiff.

CONTRACT on an account annexed as stated in the first paragraph of the opinion. Writ dated November 19, 1903.

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At the trial in the Superior Court *Aiken*, C. J. submitted to the jury the question "Was $2,500 or $3,500 the amount agreed upon for what was to be done on Grove Street?" The jury answered "$3,500." The jury returned a verdict for the plaintiff in the sum of $4,671.82; and the defendant alleged exceptions.

The case was submitted on briefs.

H. Parker, C. C. Milton & G. A. Gaskill, for the defendant.

J. F. Humes, for the plaintiff.

KNOWLTON, C. J. The exceptions in this case relate to a single item in the plaintiff's account annexed, which is a charge of $3,500 for "labor furnished, and materials furnished and actually used in making repairs and alterations on Grove Street in Worcester as per contract."

On July 22, 1901, the board of aldermen of Worcester granted a location to the defendant company for the construction of its railway. Among the "terms, conditions and obligations" imposed upon the defendant was a requirement that, "if, in the construction of said tracks, it shall become necessary in the judgment of the city engineer of the city of Worcester, to widen the wrought part, change the grade, work to grade, or to make general or specific repairs upon the whole or any portion of said streets, such work as he may direct shall be done at the expense of the said company," and another requirement that "said company shall, at its own expense and cost, pave with block paving between the rails and tracks, and for a space eighteen inches outside thereof," a certain part of the location, and shall "maintain said pavements at all times in good order and repair," etc.

There is no dispute that the street commissioner of Worcester and the mayor, representing the plaintiff, and duly authorized officers of the corporation agreed that on a certain street to which this last requirement applied, it would be better for every one concerned to have macadam used instead of block paving outside the rails, and agreed that the city should do the work of macadamizing and the defendant corporation should pay for it a stipulated price, which the jury have found to be $3,500. The plaintiff did the work according to the agreement. The defendant contends that the contract is not binding upon it because the requirement of the board of aldermen was illegal,

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because the parties, without authority, undertook by the contract to provide for a departure from this requirement of the aldermen, and because the city had no right to make such a contract.

It is not necessary to consider the validity of the requirement. That part of it which provides that the defendant shall at all times maintain the pavement in good order and repair was doubtless unauthorized, after the enactment of the St. 1898, c. 578, § 13, (R. L. c. 112, § 7.) *Springfield* v. *Springfield Street Railway*, 182 Mass. 41. Notwithstanding this, there is much ground for contending that the first part of the requirement, as to the construction, was valid. *Selectmen of Gardner* v. *Templeton Street Railway*, 184 Mass. 294, 296. However that may be, there was work to be done on the street in which both the plaintiff and the defendant were interested, about which an order had been made by the board of aldermen, purporting to require the defendant to do the work. Under these circumstances the parties made the contract and the plaintiff performed its part of it. The city may be bound by such a contract. *Brookfield* v. *Reed*, 152 Mass. 568. *Arlington* v. *Cutter*, 114 Mass. 344. *Bell* v. *Boston*, 101 Mass. 506. It is not contended that the commissioner of streets and the mayor were not proper officers to represent the city in the transaction of the business. If that were disputed, the ratification of the contract, by bringing an action upon it, would be equivalent to original authority from the city. *Melrose* v. *Hiland*, 163 Mass. 303, 311.

It is plain that the defendant may bind itself by such a contract affecting its interest, and it is conceded that the officers representing it in the agreement were properly authorized.

The fact that this construction, which was thought to be the best for everybody concerned, is a departure from the order of the board of aldermen, does not affect the validity of the contract as between the parties to it. For these reasons the contract is binding upon the defendant.

There are other grounds on which the plaintiff contends that this defence is not open to the defendant, namely, that its only answer is a general denial, (see *Granger* v. *Ilsley*, 2 Gray, 521; *Suit* v. *Woodhall*, 116 Mass. 547,) and that *ultra vires* cannot be set up as a defence to avoid payment to a corporation which

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has executed such a contract. See *Slater Woollen Co.* v. *Lamb*, 143 Mass. 420; *Nims* v. *Mount Hermon Boys' School*, 160 Mass. 177, 179, 180. These contentions need not be considered.

Exceptions overruled.

OLVIN H. LUFKIN *vs.* HENRY R. HITCHCOCK.
SAME *vs.* ELIHU L. SAWYER.

Norfolk. December 11, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, New trial, Verdict. *Negligence.*

In actions against two physicians for alleged negligence in making an examination of the plaintiff and certifying that he was insane, verdicts for the plaintiff giving him only nominal damages should not be set aside on motion of the plaintiff merely because there was evidence which would have warranted verdicts for substantial damages, if there also was evidence which would warrant a finding that the damages were insignificant, if not merely nominal.

A verdict for a plaintiff giving him only nominal damages should not be set aside on motion of the plaintiff on the ground that it was wrong on the question of the defendant's liability and should have been for the defendant, as the plaintiff is not aggrieved by this and the defendant does not complain.

If different parts of a verdict are inconsistent with one another so that they cannot stand together it is the duty of the presiding judge to set it aside and to grant a new trial.

In actions by the same plaintiff respectively against two physicians with declarations containing like counts for libel, for slander, for false imprisonment, and for alleged negligence in making an examination of the plaintiff to determine whether he was insane, it appeared that the defendants had signed a certificate that in their opinion the plaintiff was insane, and that this caused his arrest and his detention for a few hours. There was testimony that the defendants' examination of the plaintiff occupied only from seven to ten minutes. The jury returned verdicts for the defendants on the counts for libel, slander and false imprisonment, and reported that they were unable to agree on the counts for negligence without further instructions, which being given by the judge, they returned verdicts for the plaintiff on the counts for negligence but gave him only nominal damages. The judge had instructed the jury in substance that to return verdicts for the defendants on the counts for false imprisonment they must find that the plaintiff was insane and that his detention was justifiable, and that on the counts for negligence if they found that the defendants were negligent in making their examination and that their negligence was injurious to the plaintiff, they could give the plaintiff such damages as they believed him to have suffered by the defendants' wrongful acts. The plaintiff moved for a new

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trial on the ground that the verdicts were inconsistent. The judge refused to grant a new trial, and the plaintiff alleged exceptions. *Held*, that under the instructions of the judge the jury could have found that, although the plaintiff was insane and was not entitled to recover for libel, slander or false imprisonment, the examination was made hastily and negligently, but that, as the plaintiff suffered no actual damages, the verdict should be for a nominal sum, and that these findings were not contradictory or inconsistent, so that there was no ground for interfering with the exercise of the discretion of the presiding judge in denying the motion for a new trial.

TWO ACTIONS OF TORT by the same plaintiff respectively against two physicians, each declaration containing the counts described in the first paragraph of the opinion. Writs dated December 21, 1904.

In the Superior Court the cases were tried together before *Sherman*, J. The trial took the course described in the opinion, resulting in verdicts for the defendants on every count except the fifth in each declaration on which the jury in each case returned a verdict for the plaintiff in the sum of $1.

The plaintiff moved for a new trial and at the hearing upon this motion asked the judge, among other requests, to rule that the verdicts were inconsistent, and that as matter of law they must be set aside. The judge refused to rule as requested and denied the motion for a new trial. The plaintiff alleged exceptions in both cases.

F. N. Nay, (*H. T. Richardson* with him,) for the plaintiff.

C. F. Jenney, (*E. C. Jenney* with him,) for the defendants.

KNOWLTON, C. J. The questions presented by this bill of exceptions arose upon the plaintiff's motion for a new trial in each case. The declarations in the two actions are substantially alike, each containing five counts, of which the third was waived. The defendants are physicians, and they signed a certificate that in their opinion the plaintiff was insane. Their action caused his arrest and detention for a few hours. The four counts submitted to the jury were, respectively, for a libel, for slander, for false imprisonment, and for negligence in making the examination to determine whether he was insane. After deliberation the jury came into court, and, in reply to an inquiry by the judge, said that they had agreed upon a verdict for each defendant on the first, second and fourth counts, and that they had been unable to agree upon the fifth count. Thereupon their verdict was

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taken and recorded as to these three counts, and after a reply of the judge to a question, they returned to their room and considered the fifth count further. Afterwards they found for the plaintiff upon this count in each case, and gave him nominal damages. The plaintiff filed a motion to set aside the verdict on all the counts, on the ground that they were against the evidence and the weight of evidence, that the different findings were inconsistent and therefore against the law, and that the damages were inadequate. The judge, in the exercise of his discretion, overruled the motion and refused various rulings requested by the plaintiff.

Upon the admitted facts, the verdicts upon the first and second counts must have been found either upon the ground that the certificate was true, or that what was said and written was privileged. The verdicts upon the fourth count, for false imprisonment, in the two cases, could not have been found upon any other ground than that the plaintiff was insane and that his detention was justifiable. If the verdicts for the plaintiff on the fifth count were found under correct rulings of law, the jury must have decided that the defendants were negligent in making their examination, and that their negligence was injurious to the plaintiff. But if the verdicts on the fourth counts are correct, it is difficult to see how negligence in making the examination could have caused the plaintiff injury. There is, therefore, ground for the plaintiff's contention that there is a seeming inconsistency in the verdicts.

It is also true, as he contends, that, if different parts of a verdict are inconsistent with one another so that they cannot stand together, it is the duty of the court to set it aside and grant a new trial, for such a verdict is against the law. *Commonwealth* v. *Haskins*, 128 Mass. 60. *Langan* v. *Langan*, 89 Cal. 186, 195.

Usually there is no way of ascertaining in what part of an inconsistent verdict the jury made their mistake, and for that reason it is necessary to set aside the entire verdict. If, in the present case, nothing appeared but a verdict returned in the ordinary way under such instructions as would necessarily make the findings inconsistent with one another, it would be the duty of the court to grant the plaintiff's motion. But we find that

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the jury first completed their duties in regard to three counts in each case, and returned verdicts which were recorded. As to the fourth counts, on which they found for the defendants, the judge had instructed them that the questions were, first, whether or not the plaintiff was insane on December 8, and if he was, whether he was violent and likely to do damage to himself or others, and that the burden of proof was on the defendants to satisfy the jury on both these propositions, in order to entitle them to a verdict on these counts. Having settled this matter, their further deliberation on the fifth count was under these instructions: "Now there is another count and that is the count for negligence against these two doctors, and that count is that they did not properly examine, did not give sufficient time, and did not make sufficient examination to do it, or that they acted upon presumption in attempting to do it, and that they were negligent in the way they did it. They have explained that to you, why they acted so expeditiously, that here was the man in the lockup and they would not keep him unless they made a certificate, and they made the examination quickly, and it satisfied them he was in such a condition that he should be held until morning. That count is for you to determine, and if you believe the plaintiff's contention, you would be justified in finding for him on that count. If you believe, on the other hand, the defendants' claim, and that there was no malice, that everything they did they did in the best of faith, then you would be justified in finding for the defendants on that count." There was testimony that the examination of the plaintiff occupied only from seven to ten minutes. The evidence well warranted a finding that this examination was made negligently. Such negligence would be a wrong upon the plaintiff, although if he suffered no damage it would not entitle him to recover in an action at law. *Doherty* v. *Munson*, 127 Mass. 495. *Commercial Bank* v. *Ten Eyck*, 48 N. Y. 305.

On the motion for a new trial the judge found that all the verdicts for the defendants were in accordance with the evidence and the weight of evidence, and that the verdicts for the plaintiff should have been for the defendants. If we consider the fifth count by itself, we are of opinion that the assessment of nominal damages does not entitle the plaintiff to a new trial.

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It is a general rule that a new trial will not be granted on the ground of inadequacy of the damages where the action is tort for an injury to the feelings, there being no standard by which to measure damages nor any pecuniary loss. 14 Encyc. of Pl. & Pr. 764. The exception to this rule is where the evidence makes it plain that substantial damages should be awarded if the plaintiff recovers at all. See *Miller* v. *Delaware, Lackawanna & Western Railroad*, 29 Vroom, 428. While there was evidence that would have warranted verdicts in these cases for substantial damages, the verdicts should not be set aside on this ground. The damages might be found to be insignificant, if not merely nominal.

If the verdicts on this count in the two cases were wrong as to liability, they should not be set aside on the plaintiff's motion, for he is not aggrieved by them, and the defendants do not complain.

We are brought, therefore, to the main question: Whether the findings of the jury on this count leave their verdicts, as a whole, so contradictory and inconsistent that they should be set aside on the ground that they may have been founded on a mistake in that part which was first recorded. It is of much significance that the only part of the case on which the jury appear to have been troubled is the fifth count. It is also important, although not controlling, that the verdicts on the other counts were returned and recorded before the jury agreed to this part of their verdicts. It is to be noticed that the instructions on the fifth count present as the principal issue, the question whether the examination was made negligently. The jury were told that if the plaintiff was right in his contention, they should find in his favor. Nothing appears to have been said in this connection in regard to the necessity of proving damages to entitle him to a favorable verdict. They were told that in assessing damages they should consider each count by itself, and give "whatever they believed the plaintiff had suffered by the wrongful and unlawful acts of the defendants." Taking the special instruction as to the fifth count, and the general instructions as to damages, the jury might well find that, although the plaintiff was insane and not entitled to recover on the first, second and fourth counts, the examination was made hastily and negligently,

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as alleged in the fifth count, and that therefore he was entitled to a verdict on that count, but that, inasmuch as he suffered no actual damages, the verdict should be for a nominal sum. There is a statement that the judge gave other full and appropriate instructions, but we understand this to mean instructions upon subjects other than those referred to in the reported instructions.

It does not appear in the bill of exceptions that the instructions were such as to make the findings upon the fifth count contradictory or inconsistent with the findings upon the other counts. If it appeared that, in dealing with the fifth count and with the subject of damages, the judge instructed the jury that, even if they found the defendants guilty of negligence as alleged, they should still find in their favor if the plaintiff was insane, we should have the case on which the plaintiff's principal argument is founded. The burden is upon the excepting party to show that he is aggrieved.

Exceptions overruled.

SAMUEL LOMBARD & another *vs.* JAMES L. BRYNE & another.

Suffolk. December 11, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Bills and Notes. Evidence, Presumptions and burden of proof.

In an action against the indorser of a promissory note, although the production of a note in the ordinary form is *prima facie* evidence of a consideration, the burden of proof always is on the plaintiff to show that there was a consideration if this is denied by the defendant.

CONTRACT on a promissory note against James L. Bryne as maker and Samuel H. Hellen as indorser. Writ dated August 24, 1905.

The note, of which a copy was annexed to the declaration, was as follows:

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"$1000. Boston, Mass., May 22, 1905.

"Three months after date I promise to pay to the order of S. & R. J. Lombard One Thousand Dollars at any Boston bank with interest.

"James L. Bryne,
55 Bowdoin Ave.

"Value received,

"No. Due ."

Indorsed:

"S. H. Hellen."

The answer of the defendant Hellen contained a general denial, and, among other matters, alleged that this defendant's indorsement was made without any consideration.

In the Superior Court the case was tried before *Bell*, J. It appeared that the plaintiffs had sold goods to Bryne to the amount of several thousand dollars, and that Bryne in part payment therefor had given to the plaintiffs two promissory notes for the sum of $1,000 each, one of which matured before the other; that at the maturity of the earlier note a note similar to the one in suit was made by Bryne payable to the order of the plaintiffs and was indorsed by the defendant Hellen; and that the note in suit was given at the maturity of the last mentioned note in renewal of it.

It was contended by the plaintiffs, and evidence was introduced by them tending to prove, that the note in suit, as well as the note in renewal of which it was given, was indorsed by the defendant Hellen for the accommodation of Bryne, and it was contended by the defendant Hellen, and evidence was introduced by him tending to prove, that the indorsements were solely for the accommodation of the plaintiffs.

The judge, after stating to the jury that, if the indorsement of the defendant Hellen was made for the accommodation of the plaintiffs, that defendant would not be liable to them, and that if, on the other hand, the indorsement was made for the accommodation of Bryne, or to help him to get a renewal, the defendant Hellen would be liable to the plaintiffs, further instructed them that the note itself *prima facie* showed a liability on the part of the defendant Hellen to the plaintiffs, and that to overcome this *prima facie* liability the burden of proof was upon the defendant Hellen to establish the fact that

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he indorsed the note in suit for the accommodation of the plaintiffs.

The jury returned a verdict for the plaintiffs against the defendant Hellen in the sum of $1,061.66; and the defendant Hellen alleged exceptions. Certain exceptions taken by him to the admission of evidence by the judge have been made immaterial by the decision of the court.

S. H. Tyng, for the defendant Hellen.

J. C. Woodman, for the plaintiffs.

KNOWLTON, C. J. The question at the trial was whether, as between the plaintiffs and the defendant Hellen, there was a consideration for Hellen's signature upon the note. The production of the note made a *prima facie* case on this point, in favor of the plaintiffs. The defendant sought to meet it by showing that the presumption which ordinarily would arise from the form of the note was not well founded, and that there was no consideration for his signing, inasmuch as he affixed his signature merely for the accommodation of the plaintiffs. On the question whether there was a consideration for the note, the burden of proof was on the plaintiffs throughout the trial. The evidence offered by the defendant was on that issue, and was intended to meet and answer the contentions of the plaintiffs. If, on the whole evidence, the matter in dispute was left in an even balance, the plaintiffs would fail.

This is not like a case where the defendant seeks to avoid the effect of *prima facie* evidence by the proof of an independent fact outside of the issue, whereby he is relieved from liability. In such a case the defendant has the burden of proving the fact, and if he fails, the original *prima facie* case prevails.

The present case cannot be distinguished in principle from *Perley* v. *Perley*, 144 Mass. 104. See *Delano* v. *Bartlett*, 6 Cush. 364; *Broult* v. *Hanson*, 158 Mass. 17; *Temple* v. *Phelps*, 193 Mass. 297.

The jury should have been instructed that, on the whole evidence, the burden was on the plaintiffs to prove that the defendant Hellen's indorsement was for a valuable consideration.

Exceptions sustained.

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CHARLES W. VARNEY *vs.* MADISON M. BAKER & another.

Suffolk. December 11, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Corporation. Mandamus.

Under the common law of this Commonwealth the stockholders of a corporation when acting in good faith for the purpose of advancing the interests of the corporation and protecting their rights as owners should be permitted to examine the corporate property including the books and accounts.

The common law right of a stockholder of a corporation to examine its books and accounts is not an absolute one, and will not be enforced by a writ of mandamus for purposes of mere curiosity or of speculation or vexation. Upon an application for the writ the court will consider whether the petitioner's desire for an examination is reasonable in reference to the interests of the corporation and those of the petitioner as a member of it.

On a petition by a stockholder of a corporation for a writ of mandamus to obtain an examination of its books of account, if it appears that the petitioner is the owner of eighty out of three hundred and fifty shares constituting the capital stock, that the corporation three or four months before the filing of the petition lost several thousand dollars, although its officers testify that at the time of the hearing the corporation is in a prosperous condition, that the petitioner believes that the corporation is being mismanaged and desires in good faith to examine its books and records for the purpose of ascertaining its condition and the value of its stock, and if it also appears that an examination can be conducted without interfering unduly with the business of the corporation, although it is not proved that there is any mismanagement in fact or any incapacity on the part of the managing officers, the petitioner should be permitted to examine the books in accordance with his request, and such an examination includes the right to have the assistance of an expert, or other person, if he desires to make transcripts from the books for subsequent use.

St. 1908, c. 437, § 30, giving to a stockholder in a corporation the right to inspect its records and its stock and transfer books, has no application to the corporation's books of account and deposit.

KNOWLTON, C. J. This is a petition for a writ of mandamus to obtain an examination of the books of account of the defendant corporation.* The petitioner is the owner of eighty shares of the capital stock of the corporation, the whole number of shares being three hundred and fifty. The respondent Baker admitted that he told the son of the petitioner, three or four

* The Baker Shoe Company, a corporation organized under the general laws of Massachusetts.

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months before the petition was filed, that the company had lost several thousand dollars. The truth of the statement was not denied, although officers of the company testified that at the time of the hearing, the company was in a prosperous condition.

The single justice who heard the case found that the petitioner honestly believes that the company is being mismanaged, and desires in good faith, for the protection of his interest in the corporation, to examine the books and records of the company for the purpose of ascertaining its condition and the value of its stock, and of determining what to do with his stock, and whether there has been mismanagement of the corporation, and if so, what effect it has had upon the assets and business of the corporation, in order that he may be enabled to bring a bill in equity for the appointment of a receiver, or to take other proper proceedings for the benefit of the corporation and of his interest therein. He also found that an examination could be conducted without interfering unduly with the business of the corporation. It was not proved to the satisfaction of the justice that there was any mismanagement in fact, or any incapacity on the part of the managing officers. The justice reserved the case for our determination, and his report presents the question of law whether, on these facts, the petitioner should have an opportunity to examine the books of account and deposit of the corporation, and if so, to what extent.

The stockholders of a corporation are the equitable owners of its assets, and the officers act in a fiduciary relation as agents of the corporation and of the stockholders. They should be ready to account to the stockholders for their doings at all reasonable times, and the stockholders have a right to inspect their records and accounts, and to ascertain whether they are faithful, honest and intelligent in the performance of their duties. There is no good reason why the stockholders, acting in good faith for the purpose of advancing the interest of the corporation and protecting their rights as owners, should not be permitted to examine the corporate property, including the books and accounts.

It was formerly held in England that this right could be exercised, against the will of the managing officers, only when there

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was a specific dispute about some corporate matter, between the stockholders and the officers. *Rex* v. *Merchant Tailors' Co.* 2 B. & Ad. 115. But this rule has been modified by statute. See St. 8 & 9 Vict. c. 16, §§ 117, 119, and St. 25 & 26 Vict. c. 89, Table A 78. The doctrine has not been adopted in America, the cases which go furthest in that direction holding that a dispute as to the alleged mismanagement of the corporation is enough to entitle the stockholder to an examination of the accounts to see whether there is a ground for an action. *Commonwealth* v. *Phœnix Iron Co.* 105 Penn. St. 111. *Phœnix Iron Co.* v. *Commonwealth*, 113 Penn. St. 563. According to the general rule in this country, it is not necessary that there should be any particular dispute to entitle the stockholder to exercise this right. Nothing more is required than that, acting in good faith for the protection of the interests of the corporation and his own interests, he desires to ascertain the condition of the company's business. *Guthrie* v. *Harkness*, 199 U. S. 148. *In re Steinway*, 159 N. Y. 250. *Huylar* v. *Cragin Cattle Co.* 13 Stew. (N. J.) 392. *State* v. *Pacific Brewing & Malting Co.* 21 Wash. 451. *Cockburn* v. *Union Bank of Louisiana*, 13 La. Ann. 289. *State* v. *Laughlin*, 53 Mo. App. 542. *Heminway* v. *Heminway*, 58 Conn. 443. See *Union Bank* v. *Knapp*, 3 Pick. 96, 108.

Of course the right at common law is not absolute, so that it can be exercised for mere curiosity, or for merely speculative purposes, or vexatiously. If the court is appealed to for the enforcement of the right, a sound discretion will be exercised to determine whether the petitioner is acting for an honest purpose, not adverse to the interests of the corporation. The court will consider whether his desire for an examination is reasonable, having reference to the interests of the corporation and his personal interest as a member of it. Its effect upon the corporation in reference to competitors and other interests will not be disregarded. But as was stated in *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495, "Courts of equity are swift to protect helpless minorities of stockholders of corporations from the oppression and fraud of majorities."

In the present case the findings of the justice show that the petitioner should be permitted to examine the books in accordance with his request. His right to such an examination in-

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cludes the right to have the assistance of an expert, or other person, if he desires to make transcripts from the books for subsequent use.

There is nothing in our statutes which enlarges or diminishes this right as it exists at common law. The provision of the St. 1903, c. 437, § 80, relates only to the copies, books and records therein referred to, and is not applicable to the present case.

Peremptory writ of mandamus to issue.

The case was submitted on briefs.

H. T. Lummus & C. N. Barney, for the petitioner.

S. R. Jones, for the respondents.

DANIEL M. FITZGERALD *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. December 12, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence. Street Railway.

In an action against a street railway company for personal injuries, where it appears that the plaintiff on a dark and misty night, in attempting to cross a track of the defendant in order to take a car which he saw approaching on the farther of its parallel tracks, walked in front of a car approaching on the nearer track at the rate of twenty miles an hour and was run down, if the plaintiff testifies that before crossing the track he looked to see whether a car was coming and did not see one, when the car in fact was in plain sight, this is not evidence of the exercise of due care, because if he looked he must have looked carelessly and is in no better position than if he had not looked at all.

TORT for personal injuries from being run down by an electric car of the defendant at about half past eleven o'clock on the evening of September 16, 1903, on Columbus Avenue in Boston, while the plaintiff was crossing a track of the defendant for the purpose of taking a car on the parallel track beyond it. Writ dated October 17, 1903.

In the Superior Court *Sherman*, J. ordered a verdict for the defendant, and at the request of the plaintiff reported the case for determination by this court. If the order was correct the verdict was to stand; otherwise, there was to be a new trial.

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J. J. Feeley & R. Clapp, for the plaintiff, submitted a brief.

E. P. Saltonstall, for the defendant.

LORING, J. The plaintiff started from the wrong, that is to say the left hand, side of a street, to cross the outward bound track of the defendant railway to take an inward bound car going to Boston. He testified that on seeing the inward bound car approach on the further track he looked both ways, did not see the outward bound car, and walked into it in going across the outward bound track to pass behind the inward bound car in order to board it. He said that the time when he looked was twenty seconds before he left the sidewalk, and it took about twenty seconds to walk across the road to the place where he was struck. A companion, McIsaac by name, who was crossing the street behind the plaintiff, said that as the plaintiff stepped on the outward bound track he, the plaintiff, looked back to see him, McIsaac. There was an arc light where the plaintiff was standing waiting for the car. It was agreed that the street at the place of the accident is straight for a distance of one eighth of a mile from the place of the accident toward Boston. The accident happened at about midnight. It was a dark night and "just misting rain." There was evidence that the outward bound car was going twenty miles an hour. On these facts the judge directed a verdict for the defendant, and the case is here on an exception to that ruling.

Roberts v. *New York, New Haven, & Hartford Railroad*, 175 Mass. 296, relied on by the defendant, is not necessarily decisive of the case at bar because the crossing there in question was the crossing of a steam railroad. See *Finnick* v. *Boston & Northern Street Railway*, 190 Mass. 382.

But the principle so clearly stated in *Roberts* v. *New York, New Haven, & Hartford Railroad*, 175 Mass. 296, is in our opinion applicable in case of a street railway. In our opinion, if one crossing the tracks of a street railway testifies that he looked to see whether a car was coming (when the car was in fact in plain sight) and that he did not see it, he must have looked carelessly and is in no better position than if he had not looked at all; as to which see *Itzkowitz* v. *Boston Elevated Railway*, 186 Mass. 142; *Dunn* v. *Old Colony Street Railway*, 186 Mass. 316; *Donovan* v. *Lynn & Boston Railroad*, 185 Mass. 533; *Quinn* v. *Boston Ele-*

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vated Railway, 188 Mass. 473. In the case at bar the plaintiff would have been guilty of contributory negligence had he walked into the car which ran over him without looking to see whether a car was coming. The case at bar is not so strong a case for the plaintiff as the case of a plaintiff crossing a double line of tracks, who is run over by a car on the further track which was hidden from him by a car on the nearer track, behind which he drives on its passing by him; as to which see *Stackpole* v. *Boston Elevated Railway*, 193 Mass. 562; *Bartlett* v. *Worcester Consolidated Street Railway*, 189 Mass. 360; *Saltman* v. *Boston Elevated Railway*, 187 Mass. 243.

Judgment on the verdict.

STANFORD L. HAYNES, executor, *vs.* THOMAS BLANCHARD.

Suffolk. December 12, 1906. — February 27, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Limitations, Statute of. Judgment. Words, "Actions upon contracts."

In this Commonwealth there is no statute of limitations which applies to an action on a judgment which is shown to be unpaid.

The provision of R. L. c. 202, § 19, that a judgment of record "shall be presumed to be paid and satisfied at the expiration of twenty years after it was rendered" relates only to judgments in regard to which there is no proof that they remain unpaid.

The provision of R. L. c. 202, § 1, cl. 4, that "actions upon contracts which are not limited by the provisions of the following section or by any other provision of law" shall be commenced only within twenty years next after the cause of action accrues, does not apply to an action on a judgment of record, because such actions are limited by another provision of law contained in § 19 of the same chapter, and *semble* also because a judgment is not a contract within the meaning of the words "actions upon contracts" as used in the clause quoted above.

CONTRACT brought by the executor of the will of Laura A. Haynes upon a judgment in favor of the plaintiff's testator against the defendant rendered in the Superior Court on July 9, 1885. Writ dated November 21, 1905.

The answer contained a general denial and a plea of payment and set up the statute of limitations.

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At the trial in the Superior Court before *Hitchcock*, J., without a jury, it appeared that the judgment was entered as set forth in the exemplification attached to the declaration; that it never had been paid in whole or in part; that it never had been reversed, annulled or satisfied; that the defendant had resided in this Commonwealth continuously since the date of the judgment; and that the writ in this action was brought more than twenty years after the entry of the judgment.

These were all the facts which appeared in evidence, and there was no controversy in regard to them.

The plaintiff asked the judge to rule as follows:

1. That the judgment was rendered as alleged in the plaintiff's declaration and that it has never been reversed, annulled or satisfied, and is now in full force.

2. That upon the facts the plaintiff is entitled to judgment in his favor.

The defendant asked the judge to rule as follows:

1. Upon the admitted facts, this action cannot be maintained.

2. The defendant is entitled to a finding in his favor.

3. The twenty years' statute of limitations applies to an action upon a judgment rendered by the Superior Court of this Commonwealth where there is nothing to avoid the operation of the statute.

4. If the plaintiff's testator recovered judgment against the defendant in this action in the Superior Court on July 9, 1885, and for more than twenty years thereafter the defendant continued to be a resident of this Commonwealth, and if nothing has been paid on account of the judgment, and no new promise has been made, and nothing appears to take the action out of the operation of any statute of limitations, the plaintiff cannot maintain this action.

The judge made the rulings requested by the plaintiff and refused to make the rulings requested by the defendant, and further ruled that the statute of limitations did not constitute a bar to this action, and that upon the facts the plaintiff was entitled to a judgment in his favor.

The judge found for the plaintiff in the sum of $4,726.43; and the defendant alleged exceptions.

The case was submitted on briefs.

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C. F. Jenney, for the defendant.

H. H. Bosworth, for the plaintiff.

KNOWLTON, C. J. This is an action upon a judgment, recovered more than twenty years before the date of the writ, and the only question is whether the action is barred by the statute of limitations.

The provision of the statute touching this question is found in R. L. c. 202, § 19, and is as follows: "A judgment or decree of a court of record of the United States or of this or any other State of the United States shall be presumed to be paid and satisfied at the expiration of twenty years after it was rendered." This is applicable only to those judgments which have been rendered more than twenty years. It is found in the chapter which contains the general statute of limitations, and it is a special limitation of judgments in regard to which there is no proof that they remain unpaid. It implies that, when there is such proof, the judgment may be enforced.

This statute was before the court in *Denny* v. *Eddy*, 22 Pick. 533. The court said in the opinion: "The only statute bar to an action on a judgment of a court of record is that contained in the Rev. Sts. c. 120, § 24, providing that every judgment 'shall be presumed to be satisfied and paid at the expiration of twenty years after the judgment was rendered.'" The case was considered in reference to a general plea of the statute of limitations, and this section is distinctly held "to be the only statute bar" to such an action. The general provisions of the statute were substantially the same then as now. Rev. Sts. c. 120, §§ 1, 7. R. L. c. 202, §§ 1, 2. In *Walker* v. *Robinson*, 136 Mass. 280, 282, this statute was again before us, and it was assumed both by counsel and the court that, on proof of non-payment, lapse of time was no bar to an action on such a judgment. In *Day* v. *Crosby*, 173 Mass. 433, there was the same assumption. We have been referred to no decision that modifies the doctrine of *Denny* v. *Eddy*, *ubi supra*, although there are two or three dicta, relied on by the defendant, which appear to have been uttered without a particular consideration of the question, and without thought of their application to this special provision of the statute. *Von Hemert* v. *Porter*, 11 Met. 210, 216. *Bannegan* v. *Murphy*, 13 Met. 251, 253.

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The defendant relies upon the fourth clause of the R. L. c. 202, § 1, which includes within the limitation of twenty years "actions upon contracts which are not limited by the provisions of the following section or by any other provision of law." This provision was before the court when *Denny* v. *Eddy* was decided. The answer to the contention is that this judgment is limited by another "provision of law," within the meaning of the statute. Section 19 is a special limitation of all such judgments, unless there is affirmative proof that they have not been paid. Section 18 also declares that, "If a special provision is otherwise made relative to the limitation of any action, the provisions of this chapter which are inconsistent therewith shall not apply." Giving § 19 its true meaning, § 1, if construed as the defendant construes it, would be inconsistent with it.

Moreover, the whole force of the defendant's argument rests upon his contention that an action upon a judgment is an action upon contract, within the meaning of the fourth clause. This clause relates only to actions of contract founded "upon contracts," while § 2 includes "actions of contract founded upon contracts or liabilities, express or implied," except, etc.

There are many cases that treat a liability upon a judgment as contractual in its nature, and some that call a judgment a contract; but there are others in which the word "contract" has been held not to include a judgment. The meaning of the word often depends upon the connection in which it is used. See *Bidleson* v. *Whytel*, 3 Burr. 1545, 1548; *Louisiana* v. *Mayor of New Orleans*, 109 U. S. 285; *Chase* v. *Curtis*, 113 U. S. 452; *Morley* v. *Lake Shore & Michigan Southern Railway*, 146 U. S. 162, 169; *Jordan* v. *Robinson*, 15 Maine, 167, 168; *Wolffe* v. *Eberlein*, 74 Ala. 99; *Smith* v. *Harrison*, 33 Ala. 706, 710; *Rae* v. *Hulbert*, 17 Ill. 572, 579.

Actions upon the judgments referred to in § 19 are specially excepted from the provisions of R. L. c. 202, § 2, and we are of opinion that such judgments are not included in the fourth clause of § 1.

Exceptions overruled.

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MYER BERMAN *vs.* HENRY N. CLARK COMPANY.

Suffolk. January 3, 1907. — February 27, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Judgment. Res Judicata. Sale, Warranty. *Damages*, Recoupment.

A judgment for the plaintiff in an action for the price of radiators furnished for houses of the defendant under a contract in writing warranting the radiators to be capable of warming all rooms in which they were placed to seventy degrees in zero weather, in which the defendant claimed in recoupment damages for a breach of this warranty and the plaintiff recovered the full amount claimed in his declaration, is a bar to a subsequent action by the purchaser against the seller for the breach of warranty. If at the trial of such subsequent action it appears that there was no zero weather before the trial of the first action, this is immaterial.

CONTRACT for a breach of a contract of warranty in writing which is quoted in the first paragraph of the opinion. Writ in the Municipal Court of the City of Boston dated January 7, 1905.

The answer contained a general denial, and also set up as a bar the judgment which is described in the opinion.

On appeal to the Superior Court the case was tried before *Crosby*, J., who ordered a verdict for the defendant, and at the request of the plaintiff reported the case for determination by this court. If the direction was wrong as a matter of law, the verdict was to be set aside and such disposition was to be made of the case as law and justice might require. If the direction was correct, judgment was to be entered for the defendant on the verdict.

The case was submitted on briefs.

R. D. Ware, for the plaintiff.

J. J. Feely & R. Clapp, for the defendant.

KNOWLTON, C. J. The defendant made a contract in writing to furnish and put in place specific apparatus for heating three houses belonging to the plaintiff. The contract contained a guaranty as follows: "We guarantee this apparatus to be complete in every way and when finished to be capable of warming all rooms in which radiators are placed to 70° in zero weather. We guarantee this apparatus against all imperfections in mate-

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rial and workmanship for one year." This action is brought to recover upon this guaranty.

An earlier action was brought by the defendant company against the plaintiff, to recover the price of this apparatus, and for extra work in connection with the contract. As a defence to this former action, the present plaintiff answered, denying that the plaintiff in that action had fulfilled its contract, and averring that it failed to provide apparatus which complied with the guaranty contained in the contract, in that the apparatus furnished has been and was unable to heat the apartments to seventy degrees in zero weather, etc., and claiming a recoupment of damages. After a trial upon these pleadings, the plaintiff in that action recovered from the present plaintiff the full amount claimed in its declaration. The only question now before us is whether the judgment in the former action is a bar to the present one.

We think it plain that it is. The principles applicable to the case were considered in *Gilmore* v. *Williams*, 162 Mass. 351, in *Bradley* v. *Bradley*, 160 Mass. 258, and in *Watts* v. *Watts*, 160 Mass. 464. See also *Morse* v. *Elms*, 131 Mass. 151. In *Gilmore* v. *Williams* it was said of the plaintiff, seeking to recover on a breach of warranty, he having previously set up this breach as a defence to an action upon the note given in consideration of the warranty, "if he chose to plead the breach of warranty in answer to the claim on the note, and if a judgment was entered against him for the whole amount due on the note, or a part of it, on the issue thus raised, the judgment would be a bar to any further claim under the warranty. This would be so whether the judgment was entered by consent of parties, or upon a default after answer, or upon a verdict after trial on the facts. His election to claim his damages by way of recoupment in that suit would be conclusive on him." This doctrine is conclusive against the right of the plaintiff to recover in the present case. There is a well recognized distinction, referred to in the cases above cited, between the effect of a judgment pleaded as an estoppel as to facts arising collaterally in another action, and its effect as a final determination of the matters declared on as the cause of action, or set up in the answer as a ground for an allowance in defence.

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It is immaterial that there had been no zero weather before the trial of the first action. The capacity of the apparatus was put in issue, and could be shown otherwise than by actual experiment. Evidence was introduced on the subject, and it would have been in the power of the court, upon motion, to continue the case for trial until there was an opportunity for an experiment, if it had been thought advisable to do so.

Judgment on the verdict.

GEORGE YORE *vs.* CITY OF NEWTON.

Middlesex. January 7, 1907. — February 27, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Evidence, Remoteness. *Practice, Civil*, View, New trial. *Way.*

In an action against a city for injury to property of the plaintiff from an alleged defect in the grading of a highway of the defendant by reason of which the furniture wagon which the plaintiff was driving toppled over, the presiding judge in his discretion properly may exclude evidence that a witness had seen at the same place bales of hay fall off a team loaded with hay, barrels fall off teams loaded with barrels and wood fall off wood teams, and if the judge thinks that such evidence would lead to issues which would be likely to distract if not to confuse the jury, to take the defendant by surprise or to prolong the trial unduly, it is his duty to exclude the evidence.

Under R. L. c. 176, § 85, a view in a civil case can be ordered only upon the motion of one of the parties, but where the jury ask for a view and one of the parties objects to the view and the other party does not object and expresses a desire to have it, this may be treated by the presiding judge as a motion for the view and he may grant it accordingly.

If, after a case has been argued and the judge has given his charge to the jury and the jury have retired to the jury room for deliberation and have remained there for two hours, the jury return to the court room and ask the judge to permit them to take a view, and one of the parties makes a motion to that effect, it is not too late for the judge to grant the view and he may reopen the case for that purpose.

If in the trial of a civil case the judge on the motion of one of the parties allows the jury to take a view, and the view is taken, followed by a verdict for the party who made the motion, but this party has not advanced the money necessary to defray the expenses of the view as required by R. L. c. 176, § 85, this is no reason for giving the other party a new trial.

TORT for injury to property of the plaintiff on or about September 8, 1903, from an alleged defect in the grading at the

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intersection of Winchester Street and Boylston Street in Newton, highways of the defendant, by reason of which the furniture wagon in which the plaintiff was driving toppled over. Writ dated September 18, 1903.

In the Superior Court the case was tried before *Bond*, J. One Mrs. Rust, a witness called by the plaintiff, had lived at the corner of Winchester Street and Boylston Street for about five years previous to the accident. She was asked on direct examination whether she had observed what effect the place in question had upon teams that were proceeding in a manner similar to the plaintiff's, and, upon testifying in the affirmative, she next was asked, what she had observed. To this question the defendant objected and the objection was sustained.

The counsel for the plaintiff stated that he offered the evidence for the purpose, first, of showing that this was a dangerous place, and that he expected the witness to testify that she had observed a team loaded with hay, and the bales fell off, and that on barrel teams the barrels had fallen off, and that she had seen wood teams, and had seen wood fall off from the teams.

The judge said "We can't try all of those cases. We don't know whether the driver was in the exercise of due care, or not."

The plaintiff's counsel then offered the evidence on the ground that it showed notice to the city, and stated that the witness would testify that such accidents were a common occurrence there. The judge excluded the evidence, saying: "We cannot try every one of those cases in order to show whether it was the road that was at fault, or whether it was the teamsters that were at fault." The counsel for the plaintiff said, "I only ask as to teams proceeding in a similar manner to the plaintiff's team."

The judge in the course of his charge instructed the jury as follows: "Now, there is no controversy here about the notice, because the town constructed the street in that way; and there is no controversy but what it could have been constructed differently. But the question is whether it was constructed properly the way it was so that there was no defect or want of repair."

After the case had been argued and the judge had given his charge to the jury, and after the jury had retired to the jury room for deliberation and had been there for about two hours,

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they requested the judge to be permitted to view the place where the accident happened. There was some question as to whether or not the streets were in the same condition at the time of the trial, which was on January 4, 1906, as at the time of the accident in September, 1903. The judge heard evidence, not in the presence of the jury, upon this point and came to the conclusion that the streets were in substantially the same condition. The counsel for the plaintiff then objected to the granting of the view. The counsel for the defendant did not object but expressed a desire to have it. The jury then were called to the court room and were informed by the judge that he had decided to accede to their request that they be permitted to view the place in question, and also stated that there was no change in the street. The judge permitted the counsel for the plaintiff and the counsel for the defendant to accompany the jury, but forbade either counsel to speak to the jury or to have any communication whatever with them.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

F. J. Carney, for the plaintiff.

W. S. Slocum, for the defendant.

LORING, J. 1. The presiding judge well might have thought that the evidence excluded would lead to issues which would be likely to distract if not confuse the jury, take the defendant by surprise, or unduly protract the trial. If the evidence had been admitted it necessarily would have involved the admission of evidence, if offered by the defendant, as to how the hay, the barrels and the wood were loaded in the other cases and in each and all of them, as to how good a driver the teamsters in the other cases were and how they drove the several teams on the other occasions. If the presiding judge did think so, it was his duty to exclude the testimony. *Shea* v. *Glendale Elastic Fabrics Co.* 162 Mass. 463. The evidence in question in *Bemis* v. *Temple*, 162 Mass. 342, was held admissible because it was not open to these objections.

2. We are of opinion that R. L. c. 176, § 35, must be taken to be an act covering the whole subject as to taking views in civil cases, and that a view can be granted only upon motion of one of the parties. After the view had been requested by the

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jury the defendant's counsel "expressed a desire to have it." This might be treated and must be taken to have been treated by the presiding judge as a motion for a view by the defendant. The statement made by the presiding judge to the jury that he "had decided to accede to their request" cannot be taken to be a statement that he did not act upon the statement made by the defendant's counsel that he desired a view, which, as we have said, is equivalent to and is to be treated as a motion. In our opinion it was not too late for the judge to grant a view at the time when the view was granted in the case at bar. Ordinarily the time for granting a view is before the evidence is put in. But if the subsequent course of the trial shows that a view should be taken, it may be granted then. It has been held in other connections that it was within the power of the judge to reopen the case at the stage when the view was granted in the case at bar. *Graef* v. *Bernard*, 162 Mass. 300.

If it is to be taken on this record that the defendant did not advance the money necessary to defray the expenses of the view, on which we express no opinion, that is no reason for giving the plaintiff a new trial. The purpose of that provision of the act is not to protect any rights of the plaintiff but merely to throw the expense of the view, in the first instance at least, on the party asking for the view.

Exceptions overruled.

A. BLUM JR.'S SONS *vs.* J. REED WHIPPLE & others.

Suffolk. January 7, 1907. — February 27, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Agency. Laches.

A person who takes from a special agent a check payable to his principal and indorsed by the agent is bound to inquire and ascertain whether the agent had authority to make such indorsement.

If a travelling salesman employed by a corporation as a special agent to make sales of wines and liquors, without authority to indorse checks payable to the corporation, indorses and negotiates such a check and embezzles the proceeds, the

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corporation can recover for the conversion of the check from the person who cashed it and caused it to be collected.

If a special agent without authority to indorse checks payable to his principal indorses and negotiates such a check and embezzles the proceeds, and thereupon absconds and the principal as soon as he learns of the transaction institutes criminal proceedings against the agent, who never is found, and if more than two years later the principal for the first time informs the person who cashed the check of its wrongful indorsement, demands from him the amount of the check, and upon refusal brings an action for its conversion, the delay of the plaintiff, which has not injured the defendant, does not as matter of law constitute a ratification of the act of the agent in indorsing the check, nor does it show such negligence or laches as to preclude the plaintiff's recovery.

CONTRACT OR TORT, for the sum of $132.92, with counts for money had and received and for the conversion of two checks. Writ in the Municipal Court of the City of Boston dated December 28, 1903.

Copies of two checks were annexed to the declaration, one dated April 26, 1901, for $82.92 and the other dated April 29, 1901, for $50. Both were payable to A. Blum Jr.'s Sons, and both were indorsed "Montrose K. Newman for A. Blum Jr.'s Sons" and "Pay to the order of the Metropolitan National Bank of Boston, J. R. Whipple & Co."

The answer contained a general denial, and alleged ratification of the indorsements of Newman by the plaintiff.

On appeal to the Superior Court the case was submitted to *Fox*, J., without a jury, upon an agreed statement of facts. The plaintiff relied solely upon its counts in tort for the conversion of the checks.

The agreed facts were as follows:

The plaintiff was a corporation doing business in the city of New York as a wholesale dealer in wines and liquors, and the defendants were the proprietors and managers of a hotel in Boston known as the Parker House. The plaintiff employed as a travelling salesman one Montrose K. Newman. While in Boston, between January 25, 1901, and May 4, 1901, Newman transmitted several orders from Boston to New York, among which were some bogus orders. He also collected during this period cash and checks from the customers from whom he had received the orders, and never transmitted either the cash or the checks to the plaintiff. Knowledge of these transactions first came to the plaintiff in May, 1901.

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In April, 1901, the Locke-Ober Company, doing business in Boston, was indebted to the plaintiff in the sum of $82.92, and Newman called upon this debtor and received, in satisfaction of the claim, a check for that amount payable to the order of the plaintiff. Newman requested the defendants to cash this check and indorsed it, "Montrose K. Newman for A. Blum Jr.'s Sons," and thereupon the defendants paid to Newman the face amount of the check, after deducting such sum as was due to the defendants from Newman for board and lodging. The defendants deposited the check to their own credit in the Metropolitan National Bank, and the check was paid by the bank upon which it was drawn. Newman had no authority to indorse the plaintiff's name to any checks or other instruments. Some time in the latter part of May, 1901, the plaintiff first was advised of the fact of the delivery of this check to Newman and of the manner in which it was cashed by the defendants. The plaintiff immediately consulted the district attorney for the county of Suffolk. It was agreed, if competent, that an indictment was returned by the grand jury for that county, at its next sitting, against Newman, on a charge arising out of this and like transactions, and that Newman was never apprehended and never has been located since that time, except that there was a rumor that he was in the Philippine Islands. No notice of the want of authority on the part of Newman to indorse this check was given by the plaintiff to the defendants until on or about October 15, 1903, at which time the check was placed in the hands of counsel for collection.

In April, 1901, one M. C. Page of Boston was indebted to the plaintiff in the sum of $50, and Newman obtained in payment of the claim a check for that amount payable to the order of the plaintiff. Newman indorsed this check in the same form as above stated, and received the money thereon from the defendants, and the defendants deposited the check to their credit in the Metropolitan National Bank, and it was paid by the bank upon which it was drawn. Newman had no authority to indorse the plaintiff's name to any checks or other instruments. Some time in the latter part of June, 1901, the plaintiff first was advised of the fact of the delivery of this check to Newman and of the manner in which it was cashed by the

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defendants. The plaintiff immediately consulted the district attorney for the county of Suffolk. It is agreed, if competent, that an indictment was returned by the grand jury for that county at its next sitting, against Newman, on a charge arising out of this and like transactions as stated above. No notice of the want of authority on the part of said Newman to indorse this check was given by the plaintiff to the defendants until on or about October 15, 1903, at which time the check was placed in the hands of counsel for collection.

The plaintiff never has received payment of these checks from any one. No demand ever has been made upon or action brought against either bank by the plaintiff.

The defendants asked the judge to rule as follows:

1. That upon the agreed statement of facts the plaintiff is not entitled to recover.

2. That it is admitted by the agreed statement of facts that Newman was the plaintiff's agent, and was rightfully in possession of the checks in question, and that the defendants cashed these checks upon the indorsement of Newman as the plaintiff's agent on or about April 26 and 29, 1901; that the plaintiff discovered that the checks had been indorsed by its agent in May and June, 1901, and that the plaintiff did not notify the defendants with reference to the indorsements until October 15, 1903. In view of these facts it is clear that the plaintiff was guilty of laches and cannot recover.

3. That the plaintiff's silence for more than two years and three months warrants the court in finding that the plaintiff ratified the acts of its agent, and therefore the plaintiff cannot recover in any form of action against these defendants.

The judge refused to make any of the rulings requested, and found for the plaintiff in the full amount of the checks with interest. The defendants alleged exceptions.

J. Gordon, for the defendants.

A. K. Cohen, for the plaintiff.

SHELDON, J. As Newman was employed by the plaintiff corporation merely as a travelling salesman, with no authority to indorse the plaintiff's name upon any checks or other instruments, and as he never was held out by the plaintiff as having any such authority, there is no doubt of the plaintiff's right of

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recovery in this action unless it has lost this right by its long silence after its discovery of Newman's wrongful acts. *Robinson* v. *Chemical National Bank*, 86 N. Y. 404. *Buckley* v. *Second National Bank*, 6 Vroom, 400. *Graham* v. *United States Savings Institution*, 46 Mo. 186. He was only a special agent of the plaintiff, with limited authority; and the defendants before taking the checks upon his indorsement were bound to inquire and ascertain the nature and extent of his authority. *Lovett, Hart & Phipps Co.* v. *Sullivan*, 189 Mass. 535, 536, and cases there cited.

But the defendants contend that the plaintiff, having allowed more than two years to elapse after learning of Newman's wrongful acts and before it gave any notice to the defendants or made any claim upon them, was guilty of laches and now must be taken to have ratified the acts of its agent Newman. They quote the language of Colt, J. in *Harrod* v. *McDaniels*, 126 Mass. 413, 415: "It is a rule in the law of agency, that when the unauthorized act of the agent is done in the execution of a power conferred, in a mode not sanctioned by its terms, and in excess or misuse of the authority given, ratification by the principal is more readily implied from slight acts of confirmation. The duty to disaffirm at once, on knowledge of the act, is said to be more imperative in such cases, because the confidence of the principal in the fitness and fidelity of the person he has selected as an agent is shown by the relations already established between them." But in that case there was evidence of ratification by the affirmative acts of the defendant. Nor were Newman's acts, as in some other cases cited by the defendants, done in the execution of a power conferred by the plaintiff, though in a mode not sanctioned by its terms, or merely in excess of the strict limitations put upon his authority. *Foster* v. *Rockwell*, 104 Mass. 167. *Brown* v. *Henry*, 172 Mass. 559, 567. Nor did the plaintiff receive any benefit from Newman's acts, as in *Brigham* v. *Peters*, 1 Gray, 139, nor was there any legal duty incumbent upon the plaintiff to give prompt notice of the facts and of its claims to the defendants; its delay could be nothing more than one of the circumstances to be weighed against it. *Greenfield Bank* v. *Crafts*, 2 Allen, 269. *Canal Bank* v. *Bank of Albany*, 1 Hill, 287. It could not have

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been ruled as matter of law that the plaintiff had ratified Newman's acts in indorsing the checks to the defendants.

Nor was the plaintiff guilty of such negligence or laches as to take away its right of recovery. This question was considered under somewhat similar circumstances in the recent case of *Murphy* v. *Metropolitan National Bank*, 191 Mass. 159, 164, 165. Here, as in that case, it did not appear that any loss was caused to the defendants or that their position was in any way changed by the failure of the plaintiff to notify them earlier than it did. *Hamlin* v. *Sears*, 82 N. Y. 327. Indeed, it affirmatively appears that the plaintiff, as soon as it learned of these transactions, instituted criminal proceedings against Newman, but that he has never since been located, except that it was rumored that he was in the Philippine Islands; and these facts are competent to show that the defendants have not been injured by the plaintiff's failure to give them any earlier notice. And see the cases cited in *Murphy* v. *Metropolitan National Bank*, 191 Mass. 159.

The rule adopted in that case as between a bank and one of its depositors applies *a fortiori* in the case at bar.

It follows that the instructions requested by the defendants were rightly refused.

Exceptions overruled.

EDISON ELECTRIC ILLUMINATING COMPANY OF BOSTON *vs.* GIBBY FOUNDRY COMPANY.

Suffolk. January 7, 1907. — February 27, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Evidence, Extrinsic affecting writings. *Deed. Covenant.*

A grantor of land, who has covenanted in the deed that the premises are free from incumbrances made or suffered by him and has warranted against such incumbrances, cannot maintain an action on an oral promise of the grantee to pay as a part of the consideration a tax assessed to the grantor as of the first day of May preceding the conveyance. Dictum in *Preble* v. *Baldwin*, 6 Cush. 549, disapproved and a part of the doctrine of that case declared to have been modified by later cases.

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KNOWLTON, C. J. On May 17, 1902, the plaintiff conveyed real estate to the defendant, with a covenant that the premises were free from incumbrances made or suffered by it, and with a special warranty against such incumbrances. A tax on the property was assessed to the plaintiff as of the first day of May, and was paid by it. This action is brought against the defendant on an alleged promise to pay this tax as a part of the consideration for the conveyance. Evidence was introduced *de bene*, tending to prove the promise, but the judge ruled that such a contract was inconsistent with the covenants in the deed and not enforceable in this action. He accordingly found for the defendant, and reported the question to this court.

The plaintiff relies upon the numerous cases in which it is held that a plaintiff may show by parol the actual consideration of a deed, and may recover the consideration upon an oral promise to pay it, notwithstanding that the receipt of it is acknowledged in the deed. *Wilkinson* v. *Scott*, 17 Mass. 249. *Paige* v. *Sherman*, 6 Gray, 511, 513. *Ely* v. *Wolcott*, 4 Allen, 506, 507. *Pickman* v. *Trinity Church*, 123 Mass. 1, 8. The defendant relies upon the limitation of this rule expressed by Chief Justice Morton in *Simanovich* v. *Wood*, 145 Mass. 180, in these words: "While for some purposes it is competent to show what the real consideration of a deed is, a party cannot, under the guise of showing what the consideration is, prove an oral agreement, either antecedent to or contemporaneous with the deed, which will cut down or vary the stipulations of his written covenant." It was expressly decided in that case, and it had been decided before, that a grantor in a deed cannot defend an action for a breach of his covenant by saying that the grantee, as a part of the consideration for the conveyance, made an oral agreement like that on which this action was brought. *Flynn* v. *Bourneuf*, 143 Mass. 277. *Spurr* v. *Andrew*, 6 Allen, 420. See also *Howe* v. *Walker*, 4 Gray, 318; *Morse* v. *Wellesley*, 156 Mass. 95; *Durkin* v. *Cobleigh*, 156 Mass. 108; *Knowlton* v. *Keenan*, 146 Mass. 86. The only question which is left open upon our decisions is whether such an oral contract to discharge an incumbrance, which cannot be availed of to relieve a grantor from his liability for a breach of his covenant of warranty, can be made a ground of recovery in an action by him for the con-

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sideration. The plaintiff relies upon *Preble* v. *Baldwin*, 6 Cush. 549, which contains language that tends to support his contention. This language has been criticised in subsequent cases, and the judgment itself seems to have been rendered without very full consideration of the effect of the covenant in the deed. See *Flynn* v. *Bourneuf*, 143 Mass. 277; *Howe* v. *Walker*, 4 Gray, 318; *Munde* v. *Lambie*, 122 Mass. 336, 338. We are of opinion that the later cases have materially modified a part of the doctrine of this case, and that the statement of the law quoted above from *Simanovich* v. *Wood* should apply to an action to recover something that should be furnished as a part of the consideration, under an oral promise which is inconsistent with a covenant in the deed.

The decision in *Newcomb* v. *Wallace*, 112 Mass. 25, is not at variance with our conclusion. In that case it was held that there was a breach of the covenant; but the plaintiff was allowed to recover only nominal damages, because the payment of the money was made by him in the performance of his promise, and even though the promise could not have been enforced, his performance of it left him without actual damage from the defendant's breach of the covenant. This was treated as a performance, in substance, by the procurement of the defendant.

Judgment on the verdict.

J. Gordon, for the plaintiff.

C. P. Lincoln, for the defendant.

PATRICK J. CURTIN, administrator, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 7, 8, 1907. — February 27, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence. Street Railway. Evidence.

In an action by an administrator against a street railway company for the death and conscious suffering of the plaintiff's intestate while employed as a conductor on a car of the defendant from being crushed between two cars, it appeared that the car of which the intestate was conductor had stopped very near the

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other car, which was standing still, for the purpose of shifting the ends and running it out in the opposite direction, that the motorman had taken his controller handles and shifted ends and the intestate had swung his trolley around and was trying to adjust it, and in attempting to do so stepped upon the fender of the adjacent car, the motorman of which standing upon the platform took hold of the trolley rope with both hands to assist him, when the adjacent car suddenly started and the plaintiff was crushed between the cars. The motorman who was trying to assist the plaintiff testified that he did not know the cause of the accident, that he did not know whether his car moved or not, that he did not touch the controller handle of his car and that immediately after the accident the handle was in the same position that it was when he stopped the car. He further testified that before the accident the car had made no sudden starts and that after the accident it went "perfectly properly" to its destination and was in first class condition. An expert testified that a car could be started by a short circuit, which exists where there is a leak, that he never had seen a car started by a short circuit, and that he had heard of cars starting of their own accord but could find no evidence of a short circuit in them. The presiding judge ordered a verdict for the defendant. *Held*, that the verdict was ordered properly; that, assuming that the jury could have found that the car started of itself, and assuming also that such starting would be evidence of a defect, there was no evidence of negligence on the part of the defendant in failing to discover a defect if there was one.

If a person is injured by the sudden starting of an electric car, where the cause of the starting is wholly a matter of conjecture and it might have occurred without fault or negligence on the part of the company operating the car, the doctrine of *res ipsa loquitur* has no application.

TORT by the administrator of the estate of John F. Curtin, a conductor in the employ of the defendant, to recover for his death and conscious suffering from being crushed between two cars of the defendant on April 10, 1901, with counts under the employers' liability act and at common law. Writ dated October 21, 1901.

At the trial in the Superior Court before *White*, J. it appeared that the deceased, John F. Curtin, was the conductor on a special car which had been waiting on a spur track; that at the time of the accident the motorman on Curtin's car ran the car out upon the main track far enough to clear the switch, stopped his car close to another car operated by one Blute as motorman, which was standing there waiting for it to come out, took his controller handles and "shifted ends"; that Curtin swung his trolley around and tried to adjust it, that the bonnet of his own car shaded the wire overhead and it was "a pretty stiff kind of trolley," so that he went in between the cars and finally stepped upon the fender of the rear car, trying to put on his trolley; that the motorman Blute, standing on the platform

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of the rear car, took hold of the trolley rope with both hands to assist Curtin, and while they were working with the rope the rear car suddenly started, and fatally crushed Curtin between the two bumpers.

Blute had been in the employ of the defendant and its predecessors for over eighteen years, and had been a motorman for nine years. He testified that he did not know whether his car moved or not, and that, of his own knowledge, he did not know any reason for this accident occurring. He testified further that up to the time of the accident there had been no sudden starts of the car; that he continued on it as motorman after the accident, and that it went "perfectly properly" to its destination; that, from the knowledge he had gained in his nine years' experience as motorman, the controller and everything about the car was in first class condition; that immediately before the accident his car had been at a standstill for about a minute, and that his brake was on and his power off; that he was leaning forward with both hands on Curtin's trolley rope, trying to assist him, when he heard him cry out; that, as he stood in the centre of the platform, the brake would be at his right and the controller box at his left hand; that the brake handle is left toward you, and that by leaning against it the brake might be loosened; that, if you start the controller handle, it will take the whole notch and start the car. He testified, further, that he was sure he did not touch the controller handle, and that the controller handle immediately after the accident was where he left it at the time he stopped the car, and "set right where it ought to be."

One O'Brien testified that Blute's car had been perfectly still for a minute and a half or two minutes, and that the car jumped when Blute leaned forward and took hold of the trolley rope.

One Donnelly, the proprietor of a steam laundry, who formerly had worked for the South Middlesex Street Railway Company, testified there were three ways in which a car could be started, — by turning on the power, letting go the brake on a grade, and by a short circuit; that a short circuit exists where there is a leak; that he never had seen a car started by a short circuit; that he never had heard a short circuit described by an accurate electrician which in his mind, as an expert, was accountable for the starting of a car; that he had heard of cars

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starting of their own accord, but could find no evidence of a short circuit in them; that, if a short circuit took place, it would be apt to blow the fuse, and certainly would be apparent to a competent inspector.

At the close of the evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

E. A. Whitman & J. T. Pugh, for the plaintiff.

E. P. Saltonstall, (*S. H. E. Freund* with him,) for the defendant.

MORTON, J. Whether the plaintiff's intestate was in the exercise of due care or not, in standing on the fender to adjust the trolley, was clearly, we think, a question for the jury, as was also, we think, the question whether the motorman accidentally touched the controller or the brake as he was assisting the plaintiff's intestate, and thereby caused the car to start. The motorman testified that he was positive that he did not touch the controller and the jury could have found that the car started in some other way, though the more reasonable explanation would seem to have been that the car was started inadvertently by the motorman as he leaned forward to take hold of the trolley rope to assist the plaintiff's intestate. We also assume in favor of the plaintiff that if the car started of itself it would be some evidence of a defect. But we see no evidence of negligence on the part of the defendant in failing to discover the defect if there was one. There was nothing to show that the car had ever started before from a state of rest. There was nothing to show that the car was not in first class condition before the accident, and the undisputed evidence was that it went to the end of the route after the accident "perfectly properly." The only cause of the accident which the expert who was called by the plaintiff suggested was that there might have been a short circuit somewhere. But if there was a short circuit neither he nor any one else attempted to show how it occurred or that it could have been discovered by the exercise of proper care on the part of the defendant. On the contrary, the expert admitted, in effect, that he never knew of a car being started by a short circuit, and that, though he had heard of a car starting of itself, he never could see any evidence of a short circuit in such cases. The cause of the accident was, therefore, wholly a matter

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of conjecture. Cases where negligence has been inferred from the happening of the accident do not apply. In those cases the circumstances were such that the jury were justified in inferring in the absence of any explanation, that according to common experience the accident would not have happened except for the defendant's fault. But where, as here, even if the accident may be evidence of a defect somewhere, the cause of the accident remains wholly a matter of conjecture and no one can say in the absence of explanation either from common experience or otherwise that it happened through the fault of the defendant the doctrine of *res ipsa loquitur* does not apply. The mere happening of an accident under such circumstances never has been held to be enough of itself to render the defendant liable. *Kenneson* v. *West End Street Railway*, 168 Mass. 1. *Hofnauer* v. *R. H. White Co.* 186 Mass. 47. *Faulkner* v. *Boston & Maine Railroad*, 187 Mass. 254. In *Byrne* v. *Boston Woven Hose & Rubber Co.* 191 Mass. 40, one of the latest of the cases relied on by the plaintiff, there was testimony tending to show that the machine had been broken and repaired, and that it was impossible for it to start from a full stop unless there was some defect in the belt or the machine itself, and manifestly, if there was, failure to discover it could properly be imputed to the defendant's negligence. In *Hebblethwaite* v. *Old Colony Street Railway*, 192 Mass. 295, the latest case relied on, the circumstances were clearly such as to warrant a finding that there was a lack of proper care on the part of the defendant.

Exceptions overruled.

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NICHOLAS BARRY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 8, 1907. — February 27, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence. Street Railway.

In an action against a street railway company for injuries incurred while the plaintiff was operating a car of the defendant as a motorman by reason of a collision of that car with another car of the defendant going in the opposite direction upon the same single track, it appeared that the plaintiff was operating a car bound outward from a city, and that a short time before the accident occurred his car was on one of two parallel tracks approaching a portion of the road where there was a single track for four hundred yards, with a turnout three hundred yards from the point where he would enter the single track, that he knew his car was late, and also knew that an inward bound car was due at the turnout in about one minute, that a rule of the defendant provided that inward bound cars had the right of way, and provided also that the utmost care and judgment must be used in the operation of cars on a single track and that the danger of collision in the night or during fog or storm must always be borne in mind, that it was in fact the custom for the inward bound car to leave the turnout and enter on the single track unless the outward bound car was in sight, that owing to a grade and a curve an outward bound car was hidden from a car on the turnout until it was within fifty yards from the turnout, that it was before seven o'clock on a foggy morning at the end of October and the plaintiff could see only three or four car lengths ahead, that the lights of the car were lighted and the rails were slippery, that to get to the turnout before the inward bound car would leave it, if on time, the plaintiff would have to run his car at the rate of about ten miles an hour, that he entered on the single track and owing to the fog and the condition of the rails ran his car at the rate of only six or seven miles an hour for fifty or seventy-five yards when the other car loomed up out of the fog about three or four car lengths away, that he put on the brakes, which did not hold, and then let them off and put on the reverse lever, which did not stop the car, and the collision occurred. *Held*, that in entering on the single track when under the circumstances he could not run the car prudently at the rate necessary to reach the turnout in safety the plaintiff as matter of law was negligent and this negligence contributed to the injury, so that he could not recover even if the defendant was negligent.

TORT for personal injuries incurred on October 30, 1901, while the plaintiff was operating a car of the defendant as a motorman by reason of a collision of that car with another car of the defendant in the manner described in the opinion, with a count at common law alleging a failure of the defendant to fur-

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nish the plaintiff with safe appliances, machinery and instrumentalities, and a second count under the employers' liability act alleging a defect in the ways, works or machinery of the defendant. Writ dated December 3, 1901.

In the Superior Court *White*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. E. McConnell, (*J. P. Magenis* with him,) for the plaintiff.

S. H. E. Freund, (*E. P. Saltonstall* with him,) for the defendant.

LORING, J. The plaintiff in this case was a motorman in the employment of the defendant. He was injured by a collision between his car and another car of the defendant going in opposite directions on a single track.

The plaintiff had been in the defendant's employ for fifteen months, and had been furnished with a book of rules which it was his duty to read and which he testified that he had read. On the morning in question, October 30, 1901, he left Arlington Centre for Sullivan Square, Boston, and return, the whole being an hour's trip. When five minutes away from the terminus in Arlington Centre there is a single track for four hundred yards, with a turnout three hundred yards from the Boston end of the single track, leaving one hundred yards between the turnout and the Arlington end of the single track. For about three hundred and fifty yards from the Boston end of the single track, that is to say, to a point fifty yards short of the turnout, there is a slight up grade. A car coming from Boston is hidden from a car on the turnout by the hill just described and by a curve at that point until the Boston car is fifty yards away from the turnout.

The plaintiff's car was due at Arlington at 6.43. It was 6.46, or between 6.45 and 6.46, when the plaintiff's car was a car length short of the Boston end of the single track, that is to say, it was then three minutes later than the hour it was due at Arlington, a run of five minutes. In other words, it was then eight minutes late. There was an inward bound car due to leave Arlington at 6.43. That car was due at the turnout at 6.47. It was a minute's run from the Boston end of the single track to the turnout after getting straightened out from slowing down to cross on to the single track. The fourteenth rule in the defendant's rule book is in these words: "Inward cars have the right

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of way and every precaution must be taken to know that the track is clear before leaving turnouts. The utmost care and judgment must be used in the operation of cars on single track. Extra cars are liable to be met at any time and the danger of collision in the night or during fog or storms must always be borne in mind. Always take the safe course." It was in fact the custom for the inward bound car to leave the turnout and enter on the single track unless the outward bound car was in fact in sight.

The morning in question was foggy. The plaintiff testified that when he reached the Boston end of the single track you could see three or four car lengths away. The rails were slippery. The evidence was conflicting as to there being leaves on the tracks. It does not appear how light it was, but it does appear that the lights were lighted. The plaintiff looked at his watch just before entering the single track, and finding that it was 6.46, or between 6.45 and 6.46, he entered on that track and ran at six to seven miles an hour for some fifty or seventy-five yards, when the other car loomed up out of the fog some three or four car lengths away. He put on the brakes; they did not hold; thereupon he let them off and put on the reverse lever; that did not stop his car, the two cars came into collision, and the plaintiff suffered the injuries here complained of.

There was evidence as to the negligence of the defendant which we do not find it necessary to state, as in our opinion the plaintiff as matter of law was negligent and his negligence contributed to the injury.

The running time from the Boston end of the single track to the turnout, a distance of three hundred yards, is stated in the evidence to be one minute. To run that distance in that time requires a speed of nearly ten miles an hour. To get to the turnout before the inward bound car left it (if that car was on time), the plaintiff had to run on substantially schedule time, namely, about ten miles an hour. He ran his car at the rate of six or seven miles an hour only. Doubtless under the circumstances he was right in not going faster. The day was so foggy that he could see ahead three or four car lengths only, and the rails were slippery. But the fact that under the circumstances he could not run with safety at the rate necessary to reach the turnout in

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safety, shows that he ought not to have entered on the single track at all.

Exceptions overruled.

JOHN L. DOUGLAS & another *vs.* CITY OF LOWELL.

Middlesex. January 8, 9, 1907. — February 27, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Contract, Construction, Implied: common counts, Performance and breach. *Municipal Corporations. Evidence.*

A contract with a city for laying upon a bridge a tar covering which was to be the foundation for wooden block paving described the required work as follows: "The flooring of the roadway of the bridge is to be covered with waterproofing, composed of two layers of a first quality, heavy tar roofing felt, of a brand satisfactory to the superintendent of streets. The layers are to be put on crosswise of bridge, each strip to lay over the previously laid strip, one-half its width, the lower strip being thoroughly mopped with hot roofing pitch. The layer as a whole is then to receive a thorough mopping with hot pitch before second layer is applied. The second layer is then to be applied in the same manner as the first and the whole finally to receive a heavy coating of pitch put on by flowing instead of mopping." *Held*, that this contract required the laying of two layers of tar roofing felt, each layer to consist of two thicknesses of felt.

Where a city has authorized its mayor and its superintendent of streets jointly to make a contract in behalf of the city for covering a bridge with tar roofing felt preparatory to paving it with wooden blocks, and they make such a contract in writing, the superintendent of streets alone has no authority to make a subsequent oral agreement with the contractor as to what is the true construction of the contract.

One who refuses to complete work which he has contracted to perform on the real estate of another unless his construction of the contract, which afterwards turns out to be wrong, is adopted, can recover nothing for the work he has done or for the value he has added to the real estate.

The use by the owner of real estate of a structure on his land, upon which work has been done by a contractor who refused to complete his contract, is not an acceptance of the work analogous to the retention of a chattel which can be returned, and gives the contractor no right of action.

The use of a bridge by the public is not an acceptance of work done upon it by a contractor who voluntarily failed to complete his contract, and gives him no right of action against the city with which the contract was made.

Under the rule which seems always to have been assumed in this Commonwealth, if a person without authority to do so agrees that a city shall take and pay for certain materials and the city uses them, the fact that the city has benefited by the use of the materials gives the owner of the materials no right of action.

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In an action against a city on a contract to do certain work upon a bridge, in which it appeared that the plaintiff refused to complete the work required by the contract unless a certain construction of the contract, which afterwards turned out to be wrong, was adopted, the plaintiff testified that the defendant's superintendent of streets, who jointly with its mayor had been authorized to make the contract, told the plaintiff on the day before his refusal to go on with the work that he had let the work to another contractor, and a contract with this other contractor, dated the day after the plaintiff's refusal to go on with the work, was offered in evidence by the plaintiff and was excluded by the judge. It appeared that on the morning of the day following the statement of the superintendent of streets which was testified to by the plaintiff, the plaintiff was at the bridge with his men and materials ready to go on with the work if his construction of the contract was adopted, and that the defendant gave him until one o'clock on that day to decide whether he would go on with the work in accordance with the defendant's rightful construction of the contract, which he refused to do. The plaintiff excepted to the exclusion of the contract with the other contractor, contending that it should have been admitted in evidence because of the statement of the superintendent of streets. *Held*, that the contract offered in evidence, dated the day after the plaintiff's refusal, did not tend to prove that the contract had been given to the other contractor on the day before such refusal, and that the statement of the superintendent of streets, if it bound the defendant, was immaterial, as the plaintiff did not act on it, but appeared the next morning ready to go on with the work and was given until one o'clock to decide whether to do so.

In an action against a city on a contract to do certain work upon a bridge it appeared that the plaintiff refused to go on with the work required by the contract unless a certain construction of the contract, which afterwards turned out to be wrong, was adopted, and that the defendant gave to the plaintiff a certain time to decide whether he would go on with the work in accordance with the defendant's rightful construction of the contract. There was evidence that the plaintiff when asked whether he would complete the contract according to the defendant's construction of it said "I am ready and willing to carry out my contract." The plaintiff contended that this warranted a finding that he was ready and offered to complete the contract on the defendant's construction of it. *Held*, that the words of the plaintiff could not be given this meaning.

CONTRACT, with four counts which are described in the opinion, on page 272. Writ dated June 15, 1905.

The contract in writing of which a copy was annexed to the declaration was as follows:

"Lowell, Mass., Nov. 17, 1904.

"Specification for furnishing and laying about 2652 square feet of water-proof covering for the floor of the Aiken Street Bridge.

"The flooring of the roadway of the bridge is to be covered with waterproofing, composed of two layers of a first quality, heavy tar roofing felt, of a brand satisfactory to the Superintendent of Streets. The layers to be put on crosswise of bridge,

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each strip to lay over the previously laid strip, one-half its width, the lower strip being thoroughly mopped with hot roofing pitch. The layer as a whole is then to receive a thorough mopping with hot pitch before second layer is applied. The second layer is then to be applied in the same manner as the first and the whole finally to receive a heavy coating of pitch put on by flowing instead of mopping. The pitch is to be of a brand and consistency satisfactory to the Superintendent of Streets. The felting is to be turned up at the curb timbers at least six (6) inches and secured by a zinc strip three (3) inches wide, thoroughly nailed.

"All materials and workmanship shall be to the entire satisfaction of the Superintendent of Streets or his representatives.

"The work is to be commenced within twenty-four hours after notification from the Superintendent of Streets, and to progress in such order as may be directed by him.

"I will furnish labor and material according to the above specifications for the sum of six hundred eighty-nine dollars.

"J. L. Douglas & Co.

"Approved
"Charles E. Howe
"Mayor. Accepted by
"Fred'k W. Farnham,
"Acting Sup't of Streets."

At the trial in the Superior Court *Hardy*, J. ordered a verdict for the defendant; and the plaintiffs alleged exceptions. The course of the trial and the evidence material to the points raised by the exceptions are described in the opinion.

W. H. Bent, for the plaintiffs.

J. G. Hill, for the defendant.

LORING, J. On Thursday, November 17, 1904, a contract in writing was made between the defendant and the plaintiffs for covering Aiken Street bridge with two layers of tar roofing felt, each layer to consist of two thicknesses of such felt, each thickness to be mopped in hot pitch and each layer to be also mopped with hot pitch after the laying of such layer was completed, the felting to be turned up at the curb timbers and secured by zinc. The mayor and acting superintendent of streets were authorized to make this contract in behalf of the city, and it was signed by them in the city's behalf. The work was to be

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done to the satisfaction of the superintendent of streets or his representatives.

It appeared that this covering was to be the foundation for wooden block paving which was to be laid by the city. The bridge was then closed to travel and the work had to be done in a hurry.

The plaintiffs began work on the following day, Friday, November 18, and on that day put down one layer of two thicknesses about one hundred feet in length. One Carney, an assistant in the city engineer's office, was detailed as inspector of the work. Just before the plaintiffs stopped work on Friday afternoon, Carney called their attention to the fact that the contract called for two layers each of two thicknesses. The plaintiffs asserted that the contract called for only one layer of two thicknesses. Carney and Charles T. Douglas, one of the plaintiffs, then called on Farnham, the acting superintendent of streets, and they had another conference at ten o'clock the next (Saturday) morning. The testimony was conflicting as to what took place at these interviews. On that day, Saturday, November 20, the plaintiffs laid the second layer on the one hundred feet already laid. On Monday the plaintiffs went to the bridge ready to go on with the work and found one Smith there ready to go on with the same work. Farnham came with the city solicitor, and, after a conference in which the plaintiffs insisted that their construction of the contract was correct and that they were ready to go on with the work as they construed the contract, Farnham served the plaintiffs with a written notice in which he demanded that the plaintiffs should go on with the work as the city construed the contract. He also notified them by word of mouth that they must decide by one o'clock to go on or not to go on. At that hour the plaintiffs persisting that they were right in their construction of the contract and would not go on with the work on the other basis, they were notified to leave and left.

One of the plaintiffs, Charles T. Douglas, testified that they had twelve barrels of pitch on the bridge, worth $24, and some zinc worth $1.40 when they left; that Carney asked him to leave it there and said "We will pay you for it"; that thereupon he left the pitch and zinc there and "they were used on the bridge."

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Douglas further testified that before he signed the contract he asked Farnham whether it called for two or four thicknesses of felting and that Farnham told him it called for two only; that at the interview between Carney, Farnham and himself on Friday evening Farnham again said that the contract called for only two thicknesses. He also testified that on Saturday morning Farnham told him that the city engineer who drew the contract said that it called for four thicknesses and that the work would have to be done that way; that Farnham directed him to put on two thicknesses more, and said that the city would pay for the additional two thicknesses as an extra.

Farnham testified that at the meeting on Friday evening he told the plaintiff Charles T. Douglas that the contract called for four thicknesses, and that at the meeting at ten o'clock the next morning he told him that the work must go ahead as the city's men were waiting to lay the blocks; and since there was a difference as to the construction of the contract he wanted Douglas to finish the one hundred feet with four thicknesses, and if he turned out to be right as to the construction of the contract he would pay him for the additional two thicknesses as an extra; and if the city was right as to the construction of the contract he would receive no extra payment, and that he would consult the city solicitor. He also testified that "No one but myself was authorized to make purchases of material and supplies for my department. I did not order from Mr. Douglas pitch, zinc or tar roofing felt nor did I agree to pay him for any of them."

On the evidence the judge directed a verdict for the defendant, and the case is here on an exception to that ruling.

The declaration contained four counts. The first count is for damages for being prevented from performing the written contract. The third count (for the same cause of action) alleges the making of the written contract and an oral agreement that it meant two thicknesses of felting, and seeks to recover damages for being prevented from performing that contract. The second count is a common count for the pitch and zinc left by the plaintiffs at Carney's request. The fourth count is a common count for the value of the work done and materials furnished by the plaintiffs in laying felting on the bridge.

1. There was nothing for the jury on the first count. By the

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true construction of the written contract the plaintiffs' men were bound to put down two layers of two thicknesses each.

2. There was nothing for the jury on the third count. It appeared that the authority to make the contract in question was given to the mayor and Farnham jointly. The plaintiffs' testimony went no further than to fix on Farnham statements as to the true construction of the contract. That cannot affect the defendant's liability under the written contract made in its behalf by the two. No case therefore was made out on the third count.

3. One who contracts to erect a structure on land of the defendant or to do work on one already erected and voluntarily refuses to complete his contract cannot recover under a common count for the value of the work done in partial performance. *Homer* v. *Shaw*, 177 Mass. 1. See also in this connection *Sipley* v. *Stickney*, 190 Mass. 43.

The plaintiffs contend that the rule is otherwise, and that a plaintiff contractor under these circumstances can recover a reasonable price for the work done subject to reduction by any damages the defendant has suffered from the contractor's failure to perform his contract; and cites in support of that contention *Hedden* v. *Roberts*, 134 Mass. 38, 40; *Bee Printing Co.* v. *Hichborn*, 4 Allen, 63; *Bowker* v. *Hoyt*, 18 Pick. 555.

Bowker v. *Hoyt* was a case where the plaintiff delivered four hundred and ten bushels of corn and offered to deliver ninety more, asserting that the contract was for the delivery of five hundred bushels in all. The defendant contended that the contract was for one thousand bushels in all, refused to accept ninety only, and kept the four hundred and ten. The jury found that the defendant was right in his contention that the contract was for one thousand bushels. This court held that the retention of the four hundred and ten bushels by the defendant after the dispute arose was ground for charging him with their reasonable value subject to reduction by damages suffered from the plaintiff's failure to deliver one thousand bushels. It is evident that there is this difference between the partial performance of a contract to deliver personal property and the partial performance of a contract to do work on a building, part of the defendant's real estate: When the contract is to deliver personal property,

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the part delivered can be returned on the plaintiff's refusing to complete the delivery called for by the contract. In case the contractor refuses to complete the work which he has contracted to do on the defendant's real estate, the part done cannot be returned.

In *Bee Printing Co.* v. *Hichborn* the plaintiff sued for the reasonable value of publishing notices of the defendant's public auction sales for six months previous to April 20, 1861. The defendant set up a special contract to publish private and public sales for $200 per annum, and that the plaintiff refused to publish the private sales. It appeared that in July, 1860, the plaintiff refused to publish certain advertisements sent to it by the defendant, on the ground that the contract covered public auction sales only. The court held that the defendant was bound to pay a reasonable price for advertisements sent to the plaintiff by the defendant after that construction was asserted by the plaintiff, subject to such damages as the defendant suffered from breach of the contract. In the case at bar there was no request made by the defendant upon the plaintiffs to do work after the dispute arose as to the meaning of the contract. Charles T. Douglas testified that Farnham asked him to put on the second layer and that the city would pay for it. But as we have said, not only was there no evidence that Farnham had authority to bind the city, but it affirmatively appeared that he had not.

We do not understand Field, J. in *Hedden* v. *Roberts*, 134 Mass. 38, 40, to have laid down the general principle here contended for by the plaintiffs, to wit, that a plaintiff who voluntarily fails to complete work which he has contracted to perform on the real estate of the defendant can recover the reasonable value of the part performed. That is not the rule. It is settled in such a case that he can recover the reasonable value to the defendant resulting from the partial performance only when he has substantially performed the whole contract and has intended in good faith to perform the whole. The cases are collected in *Burke* v. *Coyne*, 188 Mass. 401, 405.

An owner of a house erected under a contract but not in compliance with the requirements thereof is not to be held to have accepted the work as a fulfilment of the contract by his occupying the house. The contractor in such a case cannot deprive

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the owner of the use of the land on which the house is erected, and for that reason occupation of the house is not an acceptance. *Hayward* v. *Leonard*, 7 Pick. 181, 186. *Munro* v. *Butt*, 8 E. & B. 738, 753.

It is pointed out in *Hayward* v. *Leonard*, 7 Pick. 181, 184, 186, and in *Munro* v. *Butt*, 8 E. & B. 738, 753, that there is a distinction between the retention of a chattel which can be returned and the occupation of a building upon which work has been done which cannot be taken out without doing injury to the building. Field, J. in *Hedden* v. *Roberts*, 134 Mass. 38, seems to have held that a monument put up in a graveyard belongs to the same class as chattels. The case has not been cited on the point here in question since it was decided. In the case at bar no acceptance resulted from the use of the bridge by the public. See *Taft* v. *Montague*, 14 Mass. 281. This case comes within the general rule stated above in *Hayward* v. *Leonard* and *Burke* v. *Coyne*, *ubi supra*, and not within *Hedden* v. *Roberts*, 134 Mass. 38, 40.

4. We do not understand that the plaintiffs contend that they are entitled to recover solely because their pitch and tar were in fact used in the laying of the blocks by the city employees and because to that extent the city is better off. It seems always to have been assumed that a town cannot be held on that ground. See *Taft* v. *Montague*, 14 Mass. 281; *Keyes* v. *Westford*, 17 Pick. 273; *McCormick* v. *Boston*, 120 Mass. 499. See also *Goff* v. *Rehoboth*, 12 Met. 26; *Upjohn* v. *Taunton*, 6 Cush. 310; *Butler* v. *Charlestown*, 7 Gray, 12; *Brown* v. *Melrose*, 155 Mass. 587.

The plaintiffs' contention is that Farnham, who had authority to purchase materials, took the pitch and zinc and used it for the benefit of the defendant. But there is no evidence that Farnham did take the pitch and zinc or either of them, or that he knew that they were taken or used. Carney, the defendant's only witness on the point, testified that this pitch was left in exchange for pitch lent to the plaintiffs by the defendant's workmen in the course of the work. So far as the evidence goes no one else on the part of the defendant knew anything about the pitch or zinc.

The plaintiffs were not entitled to go to the jury on the promise

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of Carney to pay for the zinc and the pitch. There was no evidence that he had authority to buy material for the defendant, and there was uncontradicted testimony that Farnham alone had that authority.

5. The contract with Smith was dated November 22, the day after the plaintiffs refused to go on with the work. They contend that it should have been admitted in evidence because Farnham told Charles T. Douglas on Sunday, November 20, that he had let the work to Smith. The contract which was excluded did not prove that fact. This statement of Farnham (if it binds the defendant) is not material. The plaintiffs did not act on it but were ready with their men and materials at the bridge on Monday morning, and on their own testimony were given until one o'clock on Monday to decide whether to go on or not to go on.

6. The last contention made by the plaintiffs is that there was evidence on which the jury were warranted in finding that on Monday they were ready and offered to complete the contract work on the defendant's construction of the contract. This contention is based on the fact that Charles T. Douglas on that day, whenever asked whether he would complete the contract by laying two layers of two thicknesses each, said: "I am ready and willing to carry out my contract." The plaintiffs had previously taken the position that under the contract all they were bound to do was to put down one layer of two thicknesses. From that position they never receded. His dogged repetition of the statement that he would carry out his contract when asked if he would lay four thicknesses under these circumstances could have but one meaning.

Exceptions overruled.

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OLIVER W. MEAD *vs.* DAVID C. CUTLER & another.

Middlesex. January 9, 1907. — February 27, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Land Court. Practice, Civil, Appeal. *Constitutional Law,* Right to trial by jury.

On an appeal from the Land Court to the Superior Court under St. 1904, c. 448, § 8, no matters can be tried in the Superior Court except those specified in the appeal, and if an appeal contains no such specification it must be dismissed.

On an appeal from the Land Court to the Superior Court under St. 1904, c. 448, § 8, the matters whereby the appealing party is aggrieved may be specified by means of the issues which he desires to have framed as a part of his appeal, although a direct statement of them in the appeal would be more satisfactory. The fact that such matters are stated in the form of questions is immaterial.

A party may be aggrieved by a decree of the Land Court so as to have the right of appeal to the Superior Court under St. 1904, c. 448, § 8, in respect to a matter concerning which he has introduced no evidence, or after he has been defaulted or nonsuited.

A party to a writ of entry brought in the Land Court is not deprived of his constitutional right to a trial by jury by the provision of St. 1904, c. 448, § 8, limiting the matters to be tried by jury on an appeal to the Superior Court to those which are specified in the appeal, this being a reasonable regulation of the manner in which the right may be exercised.

MORTON, J. This is a writ of entry brought in the Land Court. The tenants filed answers but introduced no evidence. There was a finding and an assessment of damages in that court in favor of the demandant. The tenants appealed to the Superior Court. Each took a general and special appeal. The general appeals recited that the tenants were aggrieved and that they claimed an appeal to the Superior Court for a jury trial. The special appeals claimed a jury trial on the facts, and were in addition accompanied by certain issues filed therewith which the tenants prayed might be allowed as the issues to be tried in the Superior Court on the appeal. These issues were allowed by the Land Court. The demandant moved in the Superior Court to dismiss the appeals on the ground that no matters were specified in the general appeals in respect of which the tenants

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were aggrieved, and in relation to the special appeals on the ground that the Land Court had no power to allow the issues or the Superior Court to hear and determine them because it nowise appeared that the tenants were aggrieved. The motions were allowed and the appeals dismissed, and the tenants appealed to this court. The judge of the Land Court made a report to the Superior Court of the facts found by him. From this report it appears that the demandant asked him to rule that on the facts found by him that court had no power to allow issues. He refused so to rule and allowed the issues as already observed, and the demandant duly excepted. The time for the filing of the exceptions was extended to twenty days after certification to the Land Court from the Superior Court as to the final disposition of the case in the Superior Court. No exceptions therefore yet have been allowed in the Superior Court, and the only question now before us is whether that court was right in dismissing the appeals from the Land Court.

We think that the dismissal of the general appeals was right, but that the dismissal of the special appeals was wrong. The statute in regard to appeals from the Land Court provides that "no matters shall be tried in the Superior Court except those specified in the appeal," (St. 1904, c. 448, § 8,) thus requiring the appealing party to specify in his appeal the matters in respect to which he is aggrieved by the order, decision or decree complained of. There was no such specification, by reference or otherwise, in the general appeals and they were therefore rightly dismissed. The case stands differently with respect to the special appeals. The statute makes no provision as to the manner in which the matters to be tried in the Superior Court shall be specified in the appeal; and we think that they may be specified in the issues which the appellant desires to have framed as a part of his appeal, as well, though not so satisfactorily, as by a statement of them in the appeal. Naturally the issues which the appellant desires to have framed will relate to and embody the matters wherein he is aggrieved by the order, decision or decree appealed from, and the reference to and embodying of them in the appeal may well be regarded therefore as a sufficient compliance with the statute. The fact that they are in the form of questions rather than statements is imma-

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terial. A question often has the effect of a statement. It is said in the brief for the tenants that the special appeals are substantially in the form adopted by the Land Court and approved by this court. But, however that may be, we are of opinion for the reasons given that the special appeals were wrongly dismissed. In the case of *Luce* v. *Parsons*, 192 Mass. 8, relied on by the demandant the question was whether the issues which had been framed in the Land Court could be amended in the Superior Court. The question now presented did not arise. The same is true of *Jeffery* v. *Winter*, 190 Mass. 90, also relied on by the demandant. The demandant does not question the general right of the Land Court to frame issues, (R. L. c. 128, § 13; St. 1902, c. 458,) and it is plain that a party may be aggrieved by and appeal from a judgment of that court in respect to a matter concerning which he has introduced no evidence, or after he has been defaulted or nonsuited. *Holman* v. *Sigourney*, 11 Met. 436. *Ball* v. *Burke*, 11 Cush. 80. *Warburton* v. *Gourse*, 193 Mass. 203.

The tenants contend that in a writ of entry they have a general right of appeal to the Superior Court from the Land Court on all questions of law and fact, and that if the statute is to be construed as limiting their right to a trial by jury to matters specified in the appeal it is unconstitutional and void. The right of trial by jury is to be guarded with jealous care. But it is well settled that the Legislature may make reasonable regulations respecting its exercise. *Foster* v. *Morse*, 132 Mass. 354. *Holmes* v. *Hunt*, 122 Mass. 505. *Hunt* v. *Lucas*, 99 Mass. 404. *Jones* v. *Robbins*, 8 Gray, 329. The statute in regard to the Land Court fully protects the rights of parties to a jury trial by providing that "every order, decision and decree of the court . . . whereby any party is aggrieved shall be subject to appeal for a jury trial on the facts to the Superior Court for the county in which the land lies to which such order, decision or decree relates, as to any questions involved therein." R. L. c. 128, § 13. St. 1902, c. 458. St. 1904, c. 448, § 8. The provision that "no matters shall be tried in the Superior Court except those specified in the appeal" is a reasonable regulation of the mode in which the right may be exercised. Its natural effect will or may be to eliminate immaterial matters and thus

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to facilitate instead of impede the exercise of the right of trial by jury.

Judgment affirmed in respect of dismissal of general appeals and reversed in respect of dismissal of special appeals.

A. A. Wyman, for the tenants.

H. Parker, for the demandant.

BENJAMIN W. HUBBARD & others *vs.* WORCESTER ART MUSEUM.

Suffolk. January 17, 18, 1907. — February 27, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Charity. Corporation. Will. Worcester Art Museum.

Under R. L. c. 125, § 8, by the terms of which a corporation organized for a charitable purpose "may hold real and personal estate to an amount not exceeding one million five hundred thousand dollars," a gift made by will to such a corporation in excess of that amount is good against every one but the Commonwealth, and if, after the will is proved, the Legislature passes a special statute authorizing the corporation to hold real and personal property to an amount exceeding that of its property when increased by the gift, this operates as a waiver of the right of the Commonwealth to terminate the holding, and as a legislative declaration of the validity of the gift.

The Worcester Art Museum was organized under Pub. Sts. c. 115, "for the purpose of founding an institution for the promotion of art and art education in said Worcester; erecting and maintaining buildings for the preservation and exhibition of works and objects of art; making and exhibiting collections of such works, and providing instruction in the industrial, liberal and fine arts; for holding real and personal estate in the furtherance of this purpose; and for the holding and administering funds acquired by the corporation for these and kindred objects in accordance with the will of the donors. All of said property and funds of the corporation, however, are to be held solely in trust for the benefit of all the people of the city of Worcester." A gift was made by will to this corporation exceeding the amount of $1,500,000 which it was allowed to hold under R. L. c. 125, § 8. After the will was proved St. 1906, c. 312, was enacted authorizing the corporation to hold real and personal property to an amount not exceeding $5,000,000, which was more than the amount of its property as it would be when increased by the gift. The heirs of the testator brought a petition under R. L. c. 192, § 6, for leave to file an information in the

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nature of a *quo warranto* against the corporation to set aside the gift. *Held*, that, assuming that the remedy sought was the proper one if the right claimed existed, which was not passed upon, and assuming also that St. 1906, c. 312, did not make the corporation's title good against all the world, which the court held that it did, the gift was one to a public charity and would not be allowed to fail through the incapacity of the donee to hold the property, and, if such incapacity existed, the court by applying the doctrine of *cy pres* would appoint a trustee to carry out the charitable intent of the testator, so that in any view of the case the petitioners had no "private right or interest" which had been injured by the corporation to bring them within the provisions of R. L. c. 192, § 6.

KNOWLTON, C. J. This is a petition brought by the heirs of Stephen Salisbury, late of Worcester, deceased, for leave to file an information in the nature of a *quo warranto* against the respondent, under the R. L. c. 192, §§ 6–13. The Worcester Art Museum is a corporation, established under the provisions of the Pub. Sts. c. 115 (R. L. c. 125), "for the purpose," as set forth in its certificate of incorporation, "of founding an institution for the promotion of art and art education in said Worcester; erecting and maintaining buildings for the preservation and exhibition of works and objects of art; making and exhibiting collections of such works, and providing instruction in the industrial, liberal and fine arts; for holding real and personal estate in the furtherance of this purpose; and for the holding and administering funds acquired by the corporation for these and kindred objects in accordance with the will of the donors. All of said property and funds of the corporation, however, are to be held solely in trust for the benefit of all the people of the city of Worcester." By the will of Mr. Salisbury this corporation is made his residuary legatee, and if the intention of the testator is carried out, it will receive, under the will, real and personal estate amounting in value to between $2,000,000 and $3,500,000. By the R. L. c. 125, § 8, such corporations are authorized to "hold real and personal estate to an amount not exceeding one million five hundred thousand dollars." By the St. 1906, c. 312, enacted after the probate of the will, the right of this respondent to hold real and personal estate was enlarged to an amount not exceeding $5,000,000. The petitioners contend that, by reason of the limitation in the statute, the gift was void; that, as heirs at law of the testator, their rights in this part of his estate became vested on the probate of the will; that the St. 1906 is prospective in its operation, and

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does not affect the right of the respondent to hold property under this will, and that, if it were construed as applying to property devised by this will, it would be unconstitutional and void.

The statute under which the petition is brought has been considered in *Goddard* v. *Smithett*, 3 Gray, 116, in *Hartnett* v. *Plumbers' Supply Association*, 169 Mass. 229, and in other cases. We will assume in favor of the petitioners, without deciding, that if they were right in their view of the questions of substantive law involved, it would be available to give them the remedy which they seek. We come directly to the effect of the residuary clause in the will.

The attack upon its validity may be considered from two points of view: first, in reference to the rights of testators, as against their heirs, to dispose of their property for charitable or other purposes; secondly, in reference to the provisions of the law giving this kind of corporations a right to hold property to an amount not exceeding a certain sum.

From the first point of view this gift is perfect and complete. Except for the protection of the statutory rights of a husband or wife, the power of a testator in this Commonwealth to dispose of his estate by a will is unlimited. There is nothing in our law to restrain one from giving free course to his charitable inclinations, up to the last moment of his possession of a sound, disposing mind. Making charitable gifts in this Commonwealth is not against public policy, and we have no legislation, such as has long existed in England and in New York and some of the other American States, putting obstacles in the way of such testamentary acts. The only ground of objection to this part of the will is not from the point of view of the testator or of his heirs, but on account of the provision of the statute regulating the rights of corporations as to the holding of property. We must, therefore, determine the meaning and effect of this statute on which the petitioners rely.

They contend that it is by implication an absolute prohibition against the holding, at any time, in any form, for any purpose, of a greater amount of property than that stated, and that any attempt of a corporation to hold more, or of any person to put more into the ownership of a corporation, is illegal and absolutely void. The respondent contends that this implied limita-

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tion of the right to hold is made on grounds of public policy; that it is a provision only in favor of the State, which the State may enforce or not, as it chooses; that grants or devises in excess of the amounts stated are not void, but only voidable; that third persons cannot question the validity of such grants or devises, but that they are legal so long as the State leaves them undisturbed, and that the State may at any time, by a legislative act or in some other proper way, completely waive its right of enforcement.

In interpreting the act the history of earlier kindred provisions may be helpful. At common law, corporations were authorized to acquire and hold both real and personal property without limit. *In re McGraw's estate*, 111 N. Y. 66, 84. "The creation of a corporation, gives to it, amongst other powers, as incident to its existence and without any express grant of such powers, that of buying and selling." *Bank* v. *Poitiaux*, 3 Rand. 136. "A corporation has, from its nature, a right to purchase lands, though the charter contains no license to that purpose." *Leazure* v. *Hillegas*, 7 S. & R. 313. See also *Page* v. *Heineberg*, 40 Vt. 81; *Mallett* v. *Simpson*, 94 N. C. 37, 41.

Under the feudal system, when land was given to a corporation, the chief lords of whom the land was held, and the king as ultimate chief lord, lost their chances of escheat, and various other rights and incidents of military tenure. During the middle ages, the accumulation of land in the ecclesiastical corporations was so great as to be thought a national grievance. Hence the English mortmain acts, which go back for their origin to Magna Charta, St. 9 Hen. III. c. 36, and which have continued with various modifications to this day. See 7 Edw. I. c. 2; 15 Rich. II. c. 5; Shelford on Mortmain, 2, 6, 8, 16, 25, 34, 39, 809, 812; Tyssen on Charitable Bequests, 2, 383. Under these acts the alienations were not void, so as to let in the grantors and their heirs; but they merely operated as a forfeiture which gave a right to the mesne lord and the king to enter after due inquest. This right to enter was often waived by a license in mortmain. See citations above, and Tyssen on Charitable Bequests, 383; St. 7 & 8 Will. III. c. 37. In form these licenses commonly authorized a holding of property "not exceeding" a certain value.

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In later years this authority sometimes has been inserted in the charter, and this limited power of purchase has, it is said, been exceeded by almost all corporations. Shelford on Mortmain, 55. See also pages 10, 44, 49, 56, 891; Tyssen on Charitable Bequests, 393, 394, 396.

Another act, St. 9 Geo. II. c. 36, which is usually called "The Mortmain Act" but is called by Tyssen the "Georgian Mortmain Act," is of a very different nature. One of its purposes, as declared in the preamble, is to avoid "improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs." Considered in reference to its purposes, it is not properly called a mortmain act. It applies only to gifts for charitable uses; and under it all such gifts, unless made as the statute allows, are absolutely void.

We never have had any real mortmain acts in Massachusetts. The nearest approach to one was the Prov. St. 1754–5, c. 12; 3 Prov. Laws (State ed.) 778. This made deacons a corporation to take gifts for charitable purposes, limited the grants to such as would produce an income not exceeding three hundred pounds a year, and provided that they should be made by deed, three months before death, and that all bequests, devises or later grants should be void. This statute related only to gifts to deacons, and was repealed by St. 1785, c. 51 (February 20, 1786), which re-enacted a part of the law, but omitted the provision that gifts not authorized by the act should be void. *Bartlet* v. *King*, 12 Mass. 537, 545. See R. L. c. 37, § 1.

The significance of this reference to English law and to our legislation is, first, that, except for this short period, we have never had in Massachusetts any legislation prohibiting charitable gifts to trustees or corporations, or providing that any kind of conveyances, devises or bequests to corporations shall be void. On the other hand, the policy of the Commonwealth, as expressed both by legislation and the decisions of its courts, has been exceedingly liberal to testators and public charities. *Sanderson* v. *White*, 18 Pick. 328, 333, 334. *American Academy* v. *Harvard College*, 12 Gray, 582, 595, 596. *Saltonstall* v. *Sanders*, 11 Allen, 446. *Jackson* v. *Phillips*, 14 Allen, 539, 550.

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Secondly, the implied limitations upon the power of corporations to hold property, which appear in numerous enactments, have been made, not in the interest of grantors or devisors or their heirs, but in the interest of the State, on considerations of public policy. The general form of these limitations, which appears in the statute before us, and with slight variations in special charters, (a list of which, two hundred and seventy-four in number, granted in this State before 1850, has been furnished us through the industry of counsel,) corresponds with the form of licenses granted by the Crown in England under the old mortmain acts, and sometimes embodied in charters granted by Parliament. Under these English acts, grants or devises to a corporation to hold property without a license, or in excess of the amount licensed, were not void, but only voidable by the mesne lord or the king, upon entry, after inquest according to law. In view of the close relations between Massachusetts and the mother country in early times, this justifies an argument, of considerable strength, that the implied limitations in our statutes were intended to have no greater force than the old mortmain acts of England, as distinguished from the Georgian mortmain act.

We start with the inherent right, already referred to, of every corporation to take and hold property at common law, by virtue of the act of its creation. This right is recognized in our statutes by implication, without express mention. R. L. c. 109, §§ 4–6. What force is to be given to the words, "may hold real and personal estate to an amount not exceeding one million five hundred thousand dollars"? The respondent contends that their meaning is as if words were added as follows: "and beyond that amount it shall have no right as against the Commonwealth; and the Commonwealth may take proper measures, through action of the Attorney General or otherwise, to prevent or terminate such larger holding." According to the argument, a taking and holding by a corporation, above the prescribed amount, is under its inherent right. As between it and the State as the guardian of the public interest, a provision as to amount is made, which does not affect its right as to third persons. As to the general legality of the holding, except when the State chooses to enforce the law for its own benefit, the condi-

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tion is similar to that resulting from a statutory provision which is merely directory. It is not very unlike the old law as to conveyances to aliens. Such conveyances, whether by grant or devise, were good against every one but the State, and could be set aside only after office found. *Fox* v. *Southack*, 12 Mass. 143. *Waugh* v. *Riley*, 8 Met. 290. *Judd* v. *Lawrence*, 1 Cush. 531. *Kershaw* v. *Kelsey*, 100 Mass. 561.

That this is the effect of such limitations in statutes of this kind where the title of the corporation is under a grant, as distinguished from a devise, seems to be the universal rule. *Vidal* v. *Girard*, 2 How. 127, 191. *Runyan* v. *Coster*, 14 Pet. 122. *National Bank* v. *Matthews*, 98 U. S. 621. *Cowell* v. *Springs Co.* 100 U. S. 55, 60. *Jones* v. *Guaranty & Indemnity Co.* 101 U. S. 622. *National Bank* v. *Whitney*, 103 U. S. 99. *Fritts* v. *Palmer*, 132 U. S. 282. *Leazure* v. *Hillegas*, 7 S. & R. 313. *Chambers* v. *St. Louis*, 29 Mo. 543. *Bank* v. *Poitiaux*, 3 Rand. (Va.) 136. *Fayette Land Co.* v. *Louisville & Nashville Railroad*, 93 Va. 274. *Mallett* v. *Simpson*, 94 N. C. 37. *Gilbert* v. *Hole*, 2 So. Dak. 164. *Barrow* v. *Nashville & Charlotte Turnpike Co.* 9 Humph. 304. *Hough* v. *Cook County Land Co.* 73 Ill. 23. *Alexander* v. *Tolleston Club*, 110 Ill. 65. *Barnes* v. *Suddard*, 117 Ill. 237. *Hamsher* v. *Hamsher*, 132 Ill. 273. *Baker* v. *Neff*, 73 Ind. 68, 70. This is a fair deduction from the decisions in this Commonwealth. *Heard* v. *Talbot*, 7 Gray, 113. *Commonwealth* v. *Wilder*, 127 Mass. 1, 6. *Davis* v. *Old Colony Railroad*, 131 Mass. 258, 273. *West Springfield* v. *West Springfield Aqueduct Co.* 167 Mass. 128. *Slater Woollen Co.* v. *Lamb*, 143 Mass. 420. *Prescott National Bank* v. *Butler*, 157 Mass. 548. *Nantasket Beach Steamboat Co.* v. *Shea*, 182 Mass. 147. *National Pemberton Bank* v. *Porter*, 125 Mass. 333. *Atlas National Bank* v. *Savery*, 127 Mass. 75. *Bowditch* v. *New England Ins. Co.* 141 Mass. 292. *Chaffee* v. *Middlesex Railroad*, 146 Mass. 224.

The counsel for one of the petitioners says in his brief, "It is fully conceded at the outset that where a corporation takes and holds property by conveyance, or by executed gift *inter vivos*, contrary to its charter rights, no one but the State can complain. This is settled by a practically unbroken line of decisions in all the States," etc.

But if the statute were a prohibition that renders the holding

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utterly void, and the taking also void, as is argued in the opinion in *In re McGraw's estate*, 111 N. Y. 66, anybody interested could take advantage of the violation of law, unless he was precluded by estoppel. Most of the cases which we have cited do not put their decision on the ground of estoppel. Often the question might arise when there was no estoppel. The ground on which most of the cases go is that the implication is not an absolute prohibition, but only a condition affecting the rights of the corporation as between it and the State. If the holding were an illegality which was utterly void, the condition would be the same whether the taking was by grant or devise, and a variety of unfortunate consequences might follow. The property might greatly increase in value after its acquisition, as was the case in *Evangelical Baptist Society* v. *Boston*, 192 Mass. 412. In that case, although the property of the corporation largely exceeded in value the amount authorized by the statute, there was no intimation that the holding was illegal, so long as the State did not interfere. See also *Humbert* v. *Trinity Church*, 24 Wend. 587, 605. As to all interests of private persons, in the absence of interference by the State, the cases generally treat titles to property held by corporations in excess of the specially authorized amounts as good. They allow the corporations to give good titles to purchasers of such property.

Some judges, in holding that such titles cannot be taken under wills, endeavor to found a distinction upon the executed character of a title by grant, and suggest that a devise or bequest is executory. It seems to us that there is no good reason for the distinction. When a will is proved and allowed, it takes effect immediately to pass all property affected by it. The provision in the law against large holdings by corporations has no relation to the probate of the will. The act of the testator in executing the will is confirmed and given effect as a complete and executed disposition of the property, by the allowance of the will. In this respect a recorded will does not materially differ from a delivered deed. The heirs at law are bound by one as well as by the other.

The decisions upon the precise point at issue are conflicting. In *Jones* v. *Habersham*, 107 U. S. 174, a case similar to that now before us, it was held by the court, in an opinion by Mr. Justice

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Gray, that, "restrictions imposed by the charter of a corporation upon the amount of property that it may hold cannot be taken advantage of collaterally by private persons." In the same case in the Circuit Court the question had been considered previously, and the same result was reached, in an opinion by Mr. Justice Bradley of the Supreme Court of the United States, which is found in 3 Woods, 443, 475. The same rule is established in Maryland. *Hanson* v. *Little Sisters of the Poor*, 79 Md. 434. *In re Stickney's will*, 85 Md. 79, 104. *DeCamp* v. *Dobbins*, 2 Stew. (N. J.) 36, 40, was decided by the Chancellor on this ground. The decree was affirmed on another ground in the Court of Errors and Appeals, 4 Stew. (N. J.) 671, 690, in an opinion by Beasley, C. J., which contains a dictum disapproving of the view of the Chancellor. In *Farrington* v. *Putnam*, 90 Maine, 405, the court, in a very elaborate opinion, in a case identical in its leading features with that now before us, held that the gift was good. The same doctrine is stated in *Brigham* v. *Peter Bent Brigham Hospital*, 126 Fed. Rep. 796, 801; *S. C.* 134 Fed. Rep. 513, 527. It is also stated in text books. Beach, Corp. (Purdy's ed.) § 825. Thompson, Corp. §§ 5795, 5797.

The leading case which presents the opposite view is *In re McGraw's estate*, 111 N. Y. 66. Although the decision necessarily puts a construction upon a statute of that State, this construction seems to be materially affected by the policy of New York in reference to charities. Said Judge Peckham, who delivered the opinion, "We have a decided mortmain policy. It is found in our statute in relation to wills, prohibiting a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise." In *Chamberlain* v. *Chamberlain*, 43 N. Y. 424, the court refers to the prohibition of devises, and to the N. Y. St. 1860, c. 360, still in force, which makes void all bequests or devises to charity in excess of one-half the testator's property, where he leaves relatives. Other statutes have been passed, limiting the amount that can be devised to certain corporations by one testator, forbidding a devise or bequest to charities, by a person leaving relatives, of more than one fourth of his estate, and making void such gifts where the will was executed within two months before the death of the testator.

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Gen. Laws of N. Y. 1901, (Heyd. ed.) 4885, 4891, 4892. The policy of that State in regard to charities has been very unfavorable. See *Allen* v. *Stevens*, 161 N. Y. 122, 139, 140; *People* v. *Powers*, 147 N. Y. 104; *Fosdick* v. *Hempstead*, 125 N. Y. 581.

The doctrine of the New York court is stated as the law in *Davidson College* v. *Chambers*, 3 Jones Eq. 253, and adopted in *Wood* v. *Hammond*, 16 R. I. 98, 115, and *House of Mercy* v. *Davidson*, 90 Tex. 529. In the case in North Carolina the decision was by two of the three judges of the court, the Chief Justice giving an able dissenting opinion. The courts in Kentucky and Tennessee have expressed approval of the McGraw case in New York, but in terms that do not leave the grounds of their decisions entirely clear. *Cromie* v. *Louisville Orphans' Home Society*, 3 Bush, 365, 383. *Heiskell* v. *Chickasaw Lodge*, 87 Tenn. 668, 686. In reference to supposed errors in the opinion in the last case, see Pritchard on Wills, § 153, note, and *Farrington* v. *Putnam*, 90 Maine, 405, 433.

In the construction of our statute, when the question arises whether a different rule shall be established in regard to the taking and holding by a corporation under a will from that which is universally laid down in regard to a holding under a deed, we are much influenced by the policy of our law as to devises and bequests for charitable purposes. We are of opinion that, under the R. L. c. 125, § 8, a gift to a corporation under a will, to an amount in excess of the sum specially authorized, should be held no less valid than a similar acquisition of title under a deed. It is good as against every one but the Commonwealth. It follows that the St. 1906, c. 312, operated as a waiver of the Commonwealth's right to terminate the holding, and a legislative declaration of the entire validity of the provision in the will.

If we are wrong in this conclusion, the petition must be dismissed on an independent ground. The gift was to a public charity. The purposes of the Worcester Art Museum, as set forth in the agreement for its organization from which we have quoted, show the charitable uses to which all property held by it must be put. It is all held "solely in trust, for the benefit of all the people of the city of Worcester." We have no doubt that the property was given under the testator's will with a general charitable intent, with which the Worcester Art Museum, as a

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corporation, had no other connection than as an instrument to carry out the general purpose of the testator. In other words, the gift was not to the Worcester Art Museum as a corporation, apart from the charitable work in which it was engaged, nor on account of anything essential or peculiar in its performance of the charitable work described in its instrument of organization. The general charitable purpose was predominant in the mind of the testator, and not a desire to give to a particular corporation. The charitable purpose may be implied in the name or object of the devisee. *Winslow* v. *Cummings*, 3 Cush. 358. *Bliss* v. *American Bible Society*, 2 Allen, 334. *Incorporated Society* v. *Richards*, 1 Dr. & War. 258, 331. The object of the devisee, as a legally established public charity, was well known to the testator. To state the same proposition in other language, an implication to create a public charity may arise "from the character of the body to which the gift is made, or from publicly avowed purposes of its organization and action." *Old South Society* v. *Crocker*, 119 Mass. 1, 24. *Stratton* v. *Physio-Medical College*, 149 Mass. 505, 508. In such a case, if for any reason the donee named is incapable of executing the trust, the court will not allow the gift to fail for want of a donee. *Fellows* v. *Miner*, 119 Mass. 541. *Codman* v. *Brigham*, 187 Mass. 309. *Osgood* v. *Rogers*, 186 Mass. 238. *Bliss* v. *American Bible Society*, 2 Allen, 334. *Sherman* v. *Congregational Home Missionary Society*, 176 Mass. 349. *Winslow* v. *Cummings*, 3 Cush. 358. *Attorney General* v. *Stephens*, 3 Myl. & K. 347. *Hayter* v. *Trego*, 5 Russ. 113. *Loscombe* v. *Wintringham*, 13 Beav. 87. *Swasey* v. *American Bible Society*, 57 Maine, 523. *Almy* v. *Jones*, 17 R. I. 265.

If the corporation, at the time of the probate of the will, was incapable of taking the property and carrying out the general charitable intent of the testator, the court, applying the doctrine of *cy pres*, would appoint a trustee to act in its place. Inasmuch as the Legislature, by the St. 1906, c. 312, has removed the only ground of its disability, a direction to turn over the property to the corporation would accomplish perfectly the purpose of the testator. *Baker* v. *Clarke Institution for Deaf Mutes*, 110 Mass. 88.

In no view of the case have the petitioners any private right

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or interest which has been injured by the respondent, such as brings them within the provisions of R. L. c. 192, § 6.

Petition dismissed.

B. B. Jones, (*F. P. Cabot* with him,) for Gorham Hubbard and others.

C. A. Snow, for Benjamin W. Hubbard and others.

J. L. Campbell, (of Virginia,) for Eleanor C. Hubbard, filed a brief by leave of court.

John Chipman Gray & T. H. Gage, Jr., (*Roland Gray* with them,) for the respondent.

ELSIE CORCORAN *vs.* PATRICK H. HIGGINS.

Suffolk. January 18, 1907. — February 27, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Jurisdiction. Practice, Civil, Verdict, New trial, Writ of review. *Bastardy.*

An objection of substance to the jurisdiction of the court before which a case is being tried can be taken at any stage of the proceedings.

If a judge sets aside a verdict and grants a new trial when he has no jurisdiction to do so, and the person in whose favor the verdict was rendered does not take any exception to the allowance of the motion for a new trial or to the order granting it, this does not preclude him from raising at the new trial the question of the court's jurisdiction to set aside the verdict.

Prosecutions under R. L. c. 82, known as the bastardy act, are in the nature of civil proceedings.

In a prosecution under R. L. c. 82, known as the bastardy act, the Superior Court has the power to set aside a verdict of not guilty and order a new trial.

The provision in § 15 of R. L. c. 82, known as the bastardy act, after providing that upon the trial of the complaint the issue to the jury shall be whether the defendant is guilty or not guilty, that "If the jury find him not guilty, the court shall order him to be discharged," and that "the verdict in either case shall be final," first was enacted in St. 1785, c. 66, § 2, when under a statute long since repealed the parties in civil actions and the defendant in criminal cases had a right to a second trial upon the facts if they were dissatisfied with the verdict, and never was intended to take away the power of the presiding judge to set aside a verdict and grant a new trial in bastardy proceedings. Whether the statutory provisions in regard to petitions for writs of review apply to such proceedings, *quaere*.

MORTON, J. This is a bastardy complaint. The case has been tried three times in the Superior Court. At the first trial

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there was a verdict of "not guilty." On motion of the complainant this was set aside. No exception was taken by the defendant to the allowance of the motion or to the order granting a new trial. At the second trial there was a disagreement. Before the jury were empanelled the defendant moved that he be discharged on the ground that he already had been found "not guilty." The motion was denied and the defendant duly excepted. At the third trial there was a verdict of "guilty." Before the jury were empanelled the defendant made the same motion which he had made at the second trial. The motion was denied and the defendant duly excepted. The case is here on the exceptions thus taken.

It is plain that if the judge had no jurisdiction to set aside the verdict and to try the defendant again after a verdict of "not guilty" had once been rendered, then the fact that the defendant did not except to the allowance of the motion or to the order granting a new trial is immaterial. The question of the court's jurisdiction could be raised as it was in the subsequent proceedings. *Cheshire* v. *Adams & Cheshire Reservoir Co.* 119 Mass. 356. *Custy* v. *Lowell*, 117 Mass. 78. *Riley* v. *Lowell*, 117 Mass. 76. *Elder* v. *Dwight Manuf. Co.* 4 Gray, 201.

Whatever doubts may have once prevailed, it is now settled both by statute and judicial decision that proceedings under the bastardy act are in the nature of civil proceedings. R. L. c. 82, § 22. *Conefy* v. *Holland*, 175 Mass. 469. *Barnes* v. *Ryan*, 174 Mass. 117. *Davis* v. *Carpenter*, 172 Mass. 167, 175. The action of the court in setting aside the verdict cannot be objected to, therefore, on the ground that the proceedings are criminal proceedings.

The defendant contends, however, that the statute makes the verdict in his favor final. The provisions of the statute on which he relies are found in the concluding sentences of § 15 of R. L. c. 82, and are as follows: "If the jury find him not guilty, the court shall order him to be discharged. The verdict in either case shall be final." The section begins by providing that on the trial of the complaint the issue shall be whether the defendant is guilty or not guilty, and then goes on to say what shall be done if the verdict is guilty or there is a default, concluding as above. The provision in question is first found in St. 1785, c. 66,

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§ 2. It has come down to the present time by successive re-enactments in substantially the same words. Rev. Sts. c. 49, § 4. Gen. Sts. c. 72, § 7. Pub. Sts. c. 85, § 15. R. L. c. 82, § 15. It is plain, it seems to us, that the object and effect of the provision as originally enacted was to take away from parties in bastardy proceedings the right of appeal and review which parties in civil actions, and the defendant in criminal cases, had at the time when the provision was first enacted, and which gave them a right to a second trial upon the facts in case they were dissatisfied with the verdict which had been rendered, and to provide, for obvious reasons, that a verdict fairly rendered in accordance with correct rules of law should, in such proceedings, be final. Prov. St. 1701–2, c. 6; 1 Prov. Laws (State ed.) 466. Prov. St. 1720–1, c. 11; 2 Prov. Laws (State ed.) 186. Prov. St. 1751–2, c. 13; 3 Prov. Laws (State ed.) 597. Prov. St. 1753–4, c. 42; 3 Prov. Laws (State ed.) 738. Prov. St. 1756–7, c. 28; 3 Prov. Laws (State ed.) 1030. St. 1786, c. 66. The statute giving parties a right to a second trial was repealed by St. 1817, c. 85, but the provision in the bastardy act was continued in subsequent revisions after the conditions which gave rise to it had long ceased to exist. We have been referred to no case in which during the long time that it has been upon the statute book the construction contended for by the defendant has been adopted or even suggested. This is, of itself, an argument, though not a conclusive one, against its soundness. Moreover, the consequences of such a construction are against it unless it is unavoidable, which we do not think is the case. Whether the statutory provisions in regard to petitions and writs of review * apply to bastardy proceedings is a question which it is not necessary now to consider, the only question before us being whether the court properly could set aside the verdict of not guilty which was rendered at the first trial. For the reasons given above we are of opinion that it could. It follows that the exceptions must be overruled.

So ordered.

J. F. O'Connell, for the defendant.

A. D. Hill, (*H. R. Brigham* with him,) for the complainant, were not called upon.

* R. L. c. 193, §§ 21–37.

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PATRICK LAVELLE *vs.* DUNN-GREEN LEATHER COMPANY.

Middlesex. January 18, 1907. — February 27, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability.

If a workman, employed in a tannery as a helper under a carpenter, who previously has worked for the same employer in the vats of another tannery for twenty-five years, is told by the carpenter to cover over an old tanning vat which has not been in use for fourteen years, his only instructions being to get two stringers, put them in and nail new planks to them, and proceeds to lay two new stringers next to two old rotten planks which already are across the top of the vat and to spike them laterally to the old planks without providing further support, and then steps on one of the stringers which gives way, and he falls into the vat and is injured, his injuries are the result of his own negligence and his employer is not liable.

If a workman employed in a tannery as a helper under a carpenter is set to work to do an ordinary piece of carpentering in his own way, and does it in a negligent way by "toe-nailing" new stringers to old rotten planks, and the carpenter under whom he works comes along and says "those are nailed all right," and afterwards the helper steps on one of the stringers which gives way and he falls into a vat below and is injured, in an action against his employer for the injuries he cannot rely on the words of the carpenter as an assurance of safety, as he knew of the defect and the carpenter did not.

TORT for personal injuries sustained while in the employ of the defendant on October 13, 1904, in the manner described in the opinion. Writ dated November 18, 1904.

In the Superior Court *Hitchcock*, J. ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. J. Shaughnessy, for the plaintiff.

G. McC. Sargent, (*J. Lowell* with him,) for the defendant.

LORING, J. The evidence in this case was very meagre. The plaintiff at the time here in question was in the defendant's employment as a helper under the defendant's carpenter, Falkner by name. Falkner told the plaintiff to cover over an old tanning vat which had not been in use for fourteen years. The plaintiff had worked for the defendant in its vats in another factory for twenty-five years next before July, 1903. He was away for a year, and came back on July 11, 1904. At first he was set to work in the vats as before, and three or four weeks before this

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accident (which was on October 13, 1904) he was put to work under the carpenter. The plaintiff testified that the only instructions given to him were to get two stringers, put them in and nail new planks on to them. What he did, according to his own story, was to lay the stringers next to two old, rotten planks already across the vat, and then to "toe-nail" the stringers on to the old planks, that is to say, to spike them to the old planks by driving spikes diagonally through the upper side of the stringers and the lower side of the old planks. Without providing further support for them, he stepped on one of these stringers; it gave way, and he fell into the vat and suffered the injuries here complained of. An examination made after the accident showed that the old plank was rotten, and that the triangular portion below the spikes had come away from the rest of the old plank.

The plaintiff also testified that after he had nailed the stringers to the old planks Falkner "came along" and said, "Those are nailed all right"; "put the planks on them and spike them together."

On this evidence the judge directed a verdict for the defendant.

In our opinion the judge was right.

The plaintiff was set to work to do an ordinary piece of carpentering in his own way. He did it in a grossly negligent way and was injured by reason of that negligence.

He has not brought himself within *Burgess* v. *Davis Sulphur Ore Co.* 165 Mass. 71, and *Millard* v. *West End Street Railway*, 173 Mass. 512. In those cases it was shown that the superintendent knew about the defect in question and that the plaintiff did not; while here the plaintiff knew and the superintendent did not. There was no evidence here that the carpenter made any examination of the way the stringers had been supported by the plaintiff. The evidence did not show a case where the plaintiff had a right to rely on an assurance of safety given by his superintendent. See in this connection *Whittaker* v. *Bent*, 167 Mass. 588.

The old planks were not a defect in the ways, works and machinery, as was the case in *Foster* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 21, and in *Huddleston* v. *Lowell*

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Machine Shop, 106 Mass. 282, the other cases mainly relied on by the plaintiff, but it was a part of the thing the plaintiff was set to work to repair in his own way.

A man who has worked in a tannery for over twenty-five years, although not as a carpenter, cannot be so inexperienced as to be in the need of instructions when set to do such a piece of carpentering work as that here in question, or to be in need of a warning not to do what he did.

We have examined the other cases cited by the plaintiff and find nothing in them which supports his right to maintain this action.

Exceptions overruled.

JOHN W. WEEKS & another, trustees, *vs.* JAMES J. GRACE.

Suffolk. March 27, 28, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & RUGG, JJ.

Eminent Domain. Deed. Covenant. Words, "Purchase."

The appropriation of private property for a public use under the right of eminent domain is a proceeding *in rem*, and the title acquired is an independent one not derived from that of the owner of the land. Therefore the existence of an easement which was taken by a city under the right of eminent domain in a strip of land for the purpose of laying and maintaining a sewer is not a breach of a covenant in a deed of the land warranting the title against the lawful claims and demands of all persons claiming by, through or under the grantor. KNOWLTON, C. J. & HAMMOND, J. dissenting.

CONTRACT for an alleged breach of warranty in a deed given by the defendant to the plaintiffs as trustees, dated October 30, 1897, conveying certain land on Ashford Street in that part of Boston called Brighton. Writ dated November 15, 1900.

At the trial in the Superior Court before *Bell*, J. it appeared that the deed contained the following covenants: "And I the said grantor for myself and my heirs, executors and administrators, do covenant with the said grantees and their heirs and assigns that the above described premises are free from all incumbrances made by me except as aforesaid, and that I will, and

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my heirs, executors and administrators shall warrant and defend the same to the said grantees and their heirs and assigns against the lawful claims and demands of all persons claiming by, through or under me except as aforesaid but against none other."

It further appeared that on January 31, 1894, the city of Boston took by eminent domain an easement in a strip of the land conveyed by the deed for the purpose of laying and maintaining a sewer.

The defendant made certain requests for rulings which were refused by the judge. The first of these requests was for a ruling that the plaintiffs could not recover.

The judge refused to order a verdict for the defendant and submitted the case to the jury, who returned a verdict for the plaintiffs in the sum of $1,500, with interest from October 30, 1897, making in all $2,142. The defendant alleged exceptions.

The case was argued at the bar in March, 1906, before *Knowlton*, C. J., *Morton*, *Lathrop*, *Braley*, & *Sheldon*, JJ., and afterwards was submitted on briefs to all the justices. Mr. Justice Lathrop resigned before the case was decided.

E. R. Anderson, (*A. T. Smith* with him,) for the defendant.

F. Burke, (*T. J. Kenny* with him,) for the plaintiffs.

BRALEY, J. The restricted covenants against incumbrances and of warranty contained in the defendant's deed under which the plaintiffs derived their title are independent, and a breach of either would give a distinct cause of action. The building and maintaining of a public sewer through a part of the granted premises did not constitute a breach of the first covenant, as the action of the public authorities was neither caused nor permitted by the grantor. *Estabrook* v. *Smith*, 6 Gray, 572, 577. *West* v. *Spaulding*, 11 Met. 556. *Cole* v. *Lee*, 30 Maine, 392, 397. But the covenant of warranty was broken by the constructive eviction caused by its maintenance, if the easement taken by eminent domain is derived from and supported by the title of the defendant. *Comstock* v. *Smith*, 13 Pick. 116. *Raymond* v. *Raymond*, 10 Cush. 134, 140. *Smith* v. *Richards*, 155 Mass. 79, 82. It therefore becomes important to consider whether upon its exercise the public acquired in the land a derivative or an independent title.

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In *Pollard* v. *Hagan*, 3 How. 212, 223, where the right of the Federal Government in the soil of the States carved out of the Louisiana Purchase is considered, Mr. Justice M'Kinley defines this function as follows: "The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain." By force of this power, back of all private titles lies the eminent domain as an inherent attribute of organized government: *Perry* v. *Wilson*, 7 Mass. 393. *Goodyear Shoe Machinery Co.* v. *Boston Terminal Co.* 176 Mass. 115. And whenever the Legislature adjudges it expedient the property of the citizen may be appropriated for public use. The taking may be by legislative act, or the right may be delegated. *Talbot* v. *Hudson*, 16 Gray, 417, 424. *In re Mayor & Aldermen of Northampton*, 158 Mass. 299. *Abbott* v. *New York & New England Railroad*, 145 Mass. 450, 453, 454. *Commonwealth* v. *Boston Terminal Co.* 185 Mass. 281. Ordinarily where land is condemned for this purpose the quality of the estate is defined either by the paper taking, or its extent may be measured by the object to be accomplished. It may be a fee or an easement. *Harback* v. *Boston*, 10 Cush. 295. *Page* v. *O'Toole*, 144 Mass. 303. *Titus* v. *Boston*, 161 Mass. 209. *Newton* v. *Perry*, 163 Mass. 319, 321. *Newton* v. *Newton*, 188 Mass. 226, 228. But whatever the interest appropriated, the owner must be fully compensated. Declaration of Rights, art. 10. *Whitman* v. *Nantucket*, 169 Mass. 147, 149. *Hellen* v. *Medford*, 188 Mass. 42, 45. This provision of our Constitution, which either by direct enactment or by reference to similar provisions in existing laws is usually embodied in the statute by which the right is exercised or delegated, while an inseparable incident forms no part of the power itself. *Boom Co.* v. *Patterson*, 98 U. S. 403, 406. *United States* v. *Jones*, 109 U. S. 513, 518. Cooley, Const. Lim. (7th ed.) 813. Dillon, Mun. Corp. § 590. See 1 Thayer, Cas. Const. Law, 953, note. Nor does the right to compensation affect the validity of the condemnation where the landowner either assents, or allows his claim to be barred by limitation. *Haskell* v. *New Bedford*, 108 Mass. 208, 214.

If the State takes property by escheat or forfeiture it suc-

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ceeds to the title of the former owner, and claims under him. 4 Kent Com. (14th ed.) 427, note b. *Casey* v. *Inloes*, 1 Gill, 430. *Colgan* v. *McKeon*, 4 Zabr. 566, 575. And this is so when an execution is levied by sale of real estate. The purchaser by operation of law gets the debtor's title, and nothing more, and it follows that if the wife purchases under the sheriff's deed she acquires no title, which then remains in the husband, as in contemplation of law the deed is a mere conveyance from her husband to herself. *Stetson* v. *O'Sullivan*, 8 Allen, 321. In the foreclosure of a mortgage or under an assignment in bankruptcy a purchaser at the sale or the assignee can get no greater estate than the mortgagor conveyed or the bankrupt owned. These familiar instances are illustrative of derivative titles where those who purchase take by grant or succeed by assignment, and acquire no greater interest than that held by those under whom they claim.

But if the principle is applicable to real property seized in the exercise of the right of eminent domain, then if only a bare title is taken, which later is found to be invalid because a mistake has been made in ascertaining the ownership, the condemnation must be repeated, or the public can be ousted by the true owner. *Goodyear Shoe Machinery Co.* v. *Boston Terminal Co.*, *ubi supra*. The language used by this court when discussing the nature of the proceedings indicates more than a transfer of an existing title. Thus it was said in *Brown* v. *Lowell*, 8 Met. 172, 178, when speaking of the adjudication of the mayor and aldermen in laying out a way over private property, "the latter appropriates the land to the public, and divests the right of the owner to the exclusive use and possession of it, from the time it is passed." See also *Commonwealth* v. *Boston & Lowell Railroad*, 12 Cush. 254, 258; *Drury* v. *Boston*, 101 Mass. 439, 440; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 324. The probability of such an interference if a mistake has been made in the identity of the owner or owners is repugnant to the nature and scope of the right itself. To avoid such complications and to make the right immediately effective the appropriation of private property for a public use is strictly a proceeding *in rem*, and has been so defined by our decisions. *Edmands* v. *Boston*, 108 Mass. 535, 544. *Appleton* v. *Newton*, 178 Mass. 276,

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281. *Lancy* v. *Boston*, 185 Mass. 219. *Sweet* v. *Boston*, 186 Mass. 79. The power when exercised acts upon the land itself, not upon the title, or the sum of the titles if there are diversified interests. Upon appropriation all inconsistent proprietary rights are divested, and not only privies but strangers are concluded. *Clark* v. *Worcester*, 125 Mass. 226, 231. *Brigham* v. *Fayerweather*, 140 Mass. 411, 413. See also *The Avon*, Brown, Adm. 170; *Certain Logs of Mahogany*, 2 Sumner, 589. Thereafter whoever may have been the owner, or whatever may have been the quality of his estate, he is entitled to full compensation according to his interest and the extent of the taking, but the paramount right is in the public, not as claiming under him by a statutory grant, but by an independent title. *Boston Water Power Co.* v. *Boston & Worcester Railroad*, 23 Pick. 360, 393, 394. *Dingley* v. *Boston*, 100 Mass. 544, 559. *Emery* v. *Boston Terminal Co.* 178 Mass. 172, 184. *Beekman* v. *Saratoga & Schenectady Railroad*, 3 Paige, 45, 73. *Todd* v. *Austin*, 34 Conn. 78. *Harding* v. *Goodlett*, 3 Yerger, 41, 53. *Weir* v. *St. Paul, Stillwater & Taylor's Falls Railroad*, 18 Minn. 155. *West River Bridge Co.* v. *Dix*, 6 How. 507. See also *League* v. *Texas*, 184 U. S. 156; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685.

This conclusion is further supported by the analogy of the sale of land for unpaid taxes where the purchaser, which may be the city or town, gets a new unincumbered title in fee by force of the lien of the taxing power, which cuts under all incumbrances or qualifying estates. R. L. c. 13, § 48. *Harrison* v. *Dolan*, 172 Mass. 395, 398. *Emery* v. *Boston Terminal Co.* 178 Mass. 172, 184. *Hunt* v. *Boston*, 183 Mass. 303, 306. *Abbott* v. *Frost*, 185 Mass. 398, 400. *Hefner* v. *Northwestern Ins. Co.* 123 U. S. 747, 751. *Textor* v. *Shipley*, 86 Md. 424, 438. *McQuity* v. *Doudna*, 101 Iowa, 144, 146. Independently of the theory of compensation for a compulsory surrender of his land by the citizen as distinguished from the equal benefit which the taxpayer gets as the equivalent of his tax, this power of organized government to levy a proportional tax for the purpose of raising public revenue is no more essential than the power, if necessity requires its exercise, to appropriate private property for a public use. If in one case

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there is a new grant under the seizure which conveys the land as such without regard to old titles, there is no satisfactory reason why a taking under eminent domain is not of a similar nature. Indeed, the grant to the purchaser at the tax sale and the taking under eminent domain are alike to supply governmental needs. By one process it takes and conveys to pay the tax; by the other it takes and retains for its own use. In each instance the tenure is original and independent. *Goodyear Shoe Machinery Co.* v. *Boston Terminal Co.*, *Emery* v. *Boston Terminal Co.*, *Dingley* v. *Boston*, *West River Bridge Co.* v. *Dix*, *ubi supra*. The case of *Burt* v. *Merchants' Ins. Co.* 106 Mass. 356, is not in conflict. The construction of the St. of 1870, c. 327, by which the Commonwealth gave its consent that the United States might condemn land as a site for a post office in the city of Boston was the question presented for decision. This act provided that if the owners of the estates to be acquired could not agree upon the price, then an application might be made to the Superior Court to have the valuation fixed by a jury. The owners not having agreed a petition was brought, and, no proof being offered of any agreement between the parties for a purchase and sale, the question was whether the petition could be maintained. It was held that the word "purchase" was broad enough to include a taking by the delegated right of eminent domain. But this is far from saying that by the exercise of this right the public acquire nothing more than a derivative title. The language used that "the property is held under a statute conveyance, and the title is in legal phrase by purchase" is to be read in connection with the provision found in the last part of the second section that after a jury has ascertained the value, then upon tender of this sum with costs and expenses, or if the respondent refuses to accept, upon deposit of this amount for its use with the treasurer of the Commonwealth, the fee should vest in the United States. It is manifest that nothing more was meant than to say that by intendment of law title by purchase includes all title to real property except when acquired by descent, and this was the construction of similar language in *Kohl* v. *United States*, 91 U. S. 367, where it was held that while the words "to purchase" might be considered as including the power to acquire by condemnation, yet generally

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in statutes as well as by common use the word "purchase" is employed to denote acquisition by contract between the parties without governmental interference.

In the opinion of a majority of the court, the city of Boston not having acquired an easement "by, through or under" the defendant his covenant of warranty was not broken, and the ruling asked for in the defendant's first request should have been given. *West* v. *Spaulding*, *ubi supra*.

Exceptions sustained.

The CHIEF JUSTICE and Mr. Justice HAMMOND dissent.

In their opinion, a taking of property under the right of eminent domain is not an assertion or a transfer by the State of an independent paramount title, held by it against one who previously had acquired, through a grant from the government, that which purported to be a perfect title; but is merely an exercise of inherent sovereign power to compel a holder of property to give it up and transfer it for a full consideration to the State, or to a representative of the State, that takes it by an involuntary proceeding because it is needed for a public use.

In their view the covenant is not to be construed narrowly, and the taker, in such a case, claims "by, through or under" the former holder of the title, who is paid for it by the taker.

HENRY G. TODD & others *vs.* OLD COLONY RAILROAD COMPANY.

Bristol. October 23, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, HAMMOND, BRALEY, & RUGG, JJ.

Railroad. Negligence. Watercourse.

The proprietor of an ice pond cannot maintain an action of tort at common law against a railroad company for injury to his crop of ice during one season from particles of fine clay, which were washed down from the filling of an embankment made by the defendant in the construction of its road a mile and a half above the plaintiff's pond, being held in suspension in the waters of a brook that fed the pond, where it appears that the embankment was built under authority of law and was of a proper slope for its height and width, and that the kind of

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clay used for filling, while not so good as pure gravel, was in common use for railroad embankments and made a good solid embankment, and that there is likely to be more or less wash from such embankments during the first season, and where it does not appear that the attention of the agents or servants of the defendant ever was called to the fact that a mile and a half below the embankment the water of the brook was used for the cultivation of ice, there being nothing in the foregoing facts to show that the defendant had done any act not reasonably necessary and proper in the construction of its road under authority of law, so that the plaintiff's remedy, if any, was statutory. The question whether the railroad company as an upper riparian proprietor had not the right to make such a reasonable use of its own land, although unavoidably causing temporary injury to the lower proprietor, and therefore was not answerable in any form of action, was not passed upon.

HAMMOND, J. This is an action of tort for damages caused by the pollution of a natural stream. The plaintiffs are the owners of a pond five acres in extent, from which they cut ice to be sold. The pond is fed by a brook which is formed by the union "at some distance from the pond" of two small brooks respectively called the north and the south branches. These branches are winding, very irregular, in some places dry at times, and, where crossed by the defendant's railroad, have banks one and a half to two feet high and are five or six feet wide.

In 1902 the defendant built a short line of railroad crossing these two branches about a mile and a half above the plaintiffs' pond, measured by the course of the stream. In the construction of the railroad it became necessary to make a number of cuts and fillings or embankments. One embankment about twenty feet high at its highest part crossed the north branch over a box culvert built of stone; another, somewhat higher, crossed the south branch in the same way. At the trial it was agreed that the "defendant had a legal right to build this road, that it got its location, bought the land and had the work done."

It appeared at the trial that these embankments were made of earth taken from the neighboring cuts, and that some part of this earth consisted of fine clay or marl, which in wet weather during the winter of 1902–3 was washed down into the water of the brooks and, remaining in suspension in the water, damaged the ice in the plaintiffs' pond so that it was unsalable. It does not appear that after the first season, namely in the winter of 1902–3, there has been any trouble with the ice. The trial judge ruled that the plaintiffs could not recover, and directed a verdict

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for the defendant. To save another trial, however, he directed the jury to assess damages, which they did in a substantial sum, and he then reported the case for our determination. The question is whether the defendant is answerable for the loss, and, if so, whether it is answerable in this form of action.

It is strongly contended by the defendant that the right of a riparian proprietor to the purity of a stream is not absolute, but is subject to the rights of the owners and occupiers of the land above him upon the same stream to make a reasonable use of their land, even if the purity of the stream is thereby unfavorably affected, especially where the injury to the water is only transient and temporary; that in this case the use of the land by the defendant was such as at common law would have been proper and lawful; that the damage to the plaintiffs was unavoidable and transient; and therefore that the defendant is not answerable in any form of action. But we have not found it necessary to pass upon this defence, because we are of opinion that the order of the trial court may well rest upon the second ground of defence.

The defendant had the right to build these embankments, and, so long as it did only what was reasonably necessary or proper to do that work, it did no legal wrong and committed no tort even if it damaged the property of others. The remedy in such cases is under the statutes. As stated by Shaw, C. J. in *Dodge* v. *County Commissioners*, 3 Met. 380, 383: "An authority to construct any public work carries with it an authority to use the appropriate means." And this authority is to be construed with reasonable liberality. "So long as . . . [those entrusted with such authority] . . . act in good faith, within the scope of the powers granted to them, without being guilty of negligence, carelessness or wanton disregard of the rights of individuals, they will be protected from all liability, except in the mode and by the process fixed by the statute under which they act." Bigelow, J. in *Mellen* v. *Western Railroad*, 4 Gray, 301, 303.

As above stated, it was agreed at the trial that the defendant acting under the right of eminent domain had the right to make these embankments; and we do not understand the plaintiffs to contend that the culverts are too small, or that the embankments are not properly constructed except in one respect, and that is

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the manner in which the marl or fine clay was placed therein. The plaintiffs say that if this clay was to be used it should have been used so that no part of it would be washed by the rains into the brooks, or that at least reasonable care should have been taken to that end; and that such reasonable care was not exercised.

The material, including the clay, was all taken from the neighboring cuts, and all the witnesses testified that it was proper material for an embankment. Perkins, a civil engineer in the employ of the defendant, testified that such material was in common use, and that it makes a solid embankment; that it was used in the usual way, and that the slope was a proper slope to hold the embankments up. Upon cross-examination he testified however that gravel was the best material for an embankment and "washed" less than clay, and in his opinion would not be held in suspension in water so long as clay. One Blakeslee, an experienced railroad contractor called by the defendant, testified that he did the work on these embankments; that the filling was good; that such filling is in general use, and is a safe filling for railroad purposes; that the "clay, after it gets compact, gets very hard and makes a very solid bank"; and that the slope of the embankment was a proper slope for its height and width. In answer to the question whether anything more could have been done than was done to prevent the surface water from going down, he said he did not think there could. He further said: "We did what is usually done in the construction of railroad embankments, and took the usual precautions, so far as there were any to take." On cross-examination he said that in the deep cuts no pains are taken "to sort it [the loam, gravel or clay] out or say in what part of the fill . . . [each] . . . shall go"; that gravel "sheds water better than anything else." One Hatch, an employee of the defendant in its engineering department, testified that he was the inspector under Perkins; that the filling was good for railroad purposes and was put in in the ordinary manner; that in his opinion it was not possible to construct banks so that no part of the filling would be carried into the brooks; that he knew of no provision for disposing of surface water on railroad embankments and that he never saw any; "we simply give proper slope to [the] bank and let it run

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down to the low lands." Upon cross-examination he said that "if the material of the bank was all alike" there would be no gullies down the bank. Other witnesses testified to the same general effect. Indeed the evidence was uncontradicted that the filling here used, while not so good as pure gravel, is in common use for railroad embankments and makes a good, solid embankment; that there is liable to be more or less "wash" at first, but that that is only of short duration. One Dean, a civil engineer, also testified that he knew of no way of preventing "wash of the embankments some the first season." He further said: "I never saw gravel put on the outside of a slope. The objection to that is that the water would settle through the gravel and tend to have a water-course at the bottom." Indeed the whole evidence shows that the embankments were of the usual slope, constructed of materials commonly used for such a purpose, and were solid. They were built in bushy territory and crossed two small brooks, over proper stone culverts. It does not appear that the attention of the defendant's agents or servants was ever called to the fact that a mile and a half below on these brooks the water was used for the cultivation of ice. Moreover the damage is only transient. When the witnesses testify that it is not possible to do a certain thing, such for instance as preventing the wash of the embankment, we do not understand them to mean that, considered merely as an engineering feat, it cannot be done, but they mean that the expense would be so disproportionate to the end to be reached as to make the proposed act from a business and common sense point of view impracticable.

In view of all the evidence we do not think that the plaintiffs have shown that in the construction of these embankments the defendant has done any act not reasonably necessary and proper. Hence it has done no act not authorized by law. If the plaintiffs have suffered any injury their remedy must be under the statutes and not in an action at common law.

Judgment on the verdict.

W. H. Fox & F. B. Fox, for the plaintiffs.

F. S. Hall, for the defendant.

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ARTHUR L. LYNCH *vs.* LYNN BOX COMPANY.

Essex. November 9, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Negligence, Employer's liability.

If a boy nineteen years of age employed in a box factory is set to work at cutting pieces of wood for boxes upon a machine, in the use of which he is inexperienced, containing a circular saw revolving toward him against which he is to push a movable table holding the piece of wood to be cut, while attached to an adjoining stationary table about two inches back of the revolving saw is a flat piece of metal a little thinner than the saw called a spreader, intended to enter the slit in the wood as the saw cuts it and prevent the wood from closing on the saw, and if the screws attaching the spreader to the stationary table are loose, causing the spreader to go one way or the other, and this defect has existed long enough to have been known to the superintendent of the factory, but the danger from it is not known to the boy or appreciated by him and he has not been instructed in regard to it, and the boy is pushing a piece of wood on the movable table against the saw when owing to the looseness of the screws the spreader fails to enter the slit in the piece of wood but strikes the wood a little to one side of the cut causing the piece of wood to be stopped with a violent jerk and the boy's hand to be thrown forward upon the saw and he is injured, in an action by the boy against his employer for the injuries thus caused, these facts are evidence to go to the jury of the exercise by the plaintiff at the time of the accident of such care as reasonably could be expected of him, and of a failure on the part of the defendant, or of those for whose acts it was responsible, to use due care to keep the machine in a safe condition, and also of a breach of duty toward the plaintiff in failing to instruct him as to the effect of a loose or defective spreader.

TORT for personal injuries received on October 3, 1902, while the plaintiff in the employ of the defendant was operating a machine known as a heading machine used in the manufacture of wooden boxes. Writ dated December 9, 1902.

In the Superior Court the case was tried before *Lawton*, J. The plaintiff at the time of the accident was about nineteen years of age and previous to his employment by the defendant had worked for the General Electric Company. When the plaintiff first entered the employ of the defendant he was put to work on a cornering machine, and worked on this machine about a month, then he worked in the shipping room for a month or two, and then was put on a team delivering boxes. Occasionally he was taken off the team and put to work on the circular saw

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and piling lumber. He was put to work on the heading machine for the first time about a week or two before the accident, but did not work steadily on it for more than a day or two at a time. On the morning he was injured he had been driving a team up to nine or ten o'clock, when the superintendent put him to work on the heading machine. He worked till twelve o'clock, went to dinner, returned at one o'clock, and had been working on the heading machine about fifteen minutes when he was injured. The machine consisted of a movable table, a revolving circular saw and a stationary table. About two inches back of the saw was a device known as a spreader, which consisted of a piece of tin or zinc a little thinner than the saw projecting about three or four inches above the table and about five or six inches long. The spreader was about three thirty-seconds of an inch wide and the saw a little wider. The spreader was in the same plane as that in which the saw revolved, and its purpose was to fill the slit cut by the saw and prevent the slit from closing, which would cause the wood to bind on the saw. The wood to be sawed was placed on the movable table running on two iron brackets with rollers and was pushed by the operator against the saw, which revolved toward the operator. At the time of the accident the plaintiff was cutting a board on the machine, and the spreader did not enter the cut in the board, but struck the board a little to one side of the cut, which caused the board as it was being forced against the saw to stop with a violent jerk, and the plaintiff's hand was thrown forward upon the saw and was injured.

The plaintiff among other things testified that "The spreader didn't take the cut because it was loose; the screws on the spreader were loose. I didn't examine the screws."

Another workman in the factory, who operated a similar machine, testified that "The spreader was a little bit off; the screws were loose — the wood was sort of chewed away, the screws a little loose causing the spreader to go one way or the other." He also testified "I ran the machine before the accident and had observed it acting this way before. I couldn't say how long before."

The defendant's superintendent, called by the plaintiff as a witness, testified that seven or eight days before the accident he knew that the machine was out of order. He also testified that

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he instructed the plaintiff about this machine, told him the working principles and showed him how it should be worked, but did not tell him what to do in case the board struck the spreader; that it never was reported to him that that happened.

At the close of the plaintiff's evidence the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

R. L. Sisk, for the plaintiff.

R. Spring, for the defendant.

HAMMOND, J. Upon the evidence the jury might have found that the plaintiff was inexperienced with reference to this machine and should have been instructed as to the effect of a loose or defective spreader; and that at the time of the accident he was in the exercise of such care as could reasonably have been expected of him; that the accident was due to the looseness of the screws by which the spreader was bound to the stationary table, and that this defect had existed so long that if reasonable care had been exercised by the defendant, or those for whose care it was responsible, this defect would have been remedied. In other words, the jury might have found that the plaintiff was careful and that the accident was due to the failure on the part of the defendant to use due care for the safe condition of the machines. The jury might further have found that the danger of the loose spreader was not known to or appreciated by the plaintiff. Upon such findings a case would have been made out by the plaintiff. We think that the plaintiff was entitled to have his case submitted to the jury.

Exceptions sustained.

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ROGER P. CUSHING, administrator, *vs.* G. W. & F. SMITH IRON COMPANY.

Suffolk. November 13, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's Liability. *Practice, Civil.*

The fact that a chain which in good condition would sustain a load of thirty-five hundred pounds broke under a load of only eighteen hundred pounds when there was no sudden or unusual strain upon it warrants a finding that the chain was defective.

In an action by an administrator for the death and conscious suffering of his intestate while in the employ of the defendant caused by an iron column falling upon him owing to the breaking of a defective link of a chain by which it was being hoisted, it is no defence that there were on the spot other chains furnished by the defendant which were suitable and that the chain which broke was selected by a fellow servant of the plaintiff's intestate, if this chain when in proper condition would have been suitable and the fellow servant using such care as reasonably might be expected of him did not discern the defect.

If a trial judge makes a general ruling that a plaintiff cannot recover and orders a verdict for the defendant, for which he gives a wrong reason, the plaintiff is not entitled to a new trial unless he can show some ground upon which his case should have been submitted to the jury.

In an action by an administrator for the death and conscious suffering of his intestate while in the employ of the defendant caused by an iron column falling upon him owing to the breaking of a defective link of a chain by which it was being hoisted, there was evidence that the chain was part of a longer one which when purchased by the defendant was in sound condition, that the longer chain was cut up by the defendant and this part of it was fitted for use by adding to it a large link, in doing which the link which broke had been opened and after the large link had been inserted had been closed by a weld, that the weld was defective by reason of the carelessness of the smith who made it, and that the breaking of the link was due to that defect. *Held*, that this was evidence of the defendant's negligence to be submitted to the jury; and that if the negligence in making the weld was that of a fellow servant of the plaintiff's intestate this did not relieve the defendant from liability.

TORT, by the administrator of the estate of George H. Hayes, for causing the death and conscious suffering of the plaintiff's intestate while in the employ of the defendant as a teamster, with three counts, the first alleging a defect in the ways, works or machinery of the defendant, the second alleging negligence of a superintendent, and the third at common law alleging a failure to furnish and keep in repair suitable machinery and appliances

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for the work in which the intestate was employed. Writ dated December 15, 1902.

In the Superior Court the case was tried before *Bond*, J. At the close of the plaintiff's evidence the defendant asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover. The judge ruled as requested, stating that it might be assumed that the plaintiff's intestate was in the exercise of due care, there being no controversy about it, and concluding his instructions to the jury as follows: "Where a workman is injured by the act of a fellow workman the master is never liable, and in this case if there was any one whose negligence resulted in this accident caused by the picking out of this chain, it was a fellow servant. So you may return a verdict for the defendant and the matter may go to another court and it can be determined whether my ruling is right about it."

The jury returned a verdict for the defendant as directed; and the plaintiff alleged exceptions.

A. P. Stone, for the plaintiff.

W. I. Badger, (*P. G. Carleton* with him,) for the defendant.

HAMMOND, J. Hayes, the intestate, was an employee of the defendant, and while employed in lifting a heavy iron column, was injured by reason of the breaking of the chain supporting the column. No question is made as to his due care.

The only question is whether there was any evidence of the defendant's negligence. All the witnesses testified that the chain was made of links approximately half an inch in diameter, and that a chain of that description in good condition was a proper chain to use in lifting a weight varying from thirty-five hundred to four thousand pounds; that the weight of the column which was actually being lifted when the chain broke was about eighteen hundred pounds, which "was well within the limits of safety." There was also testimony "that at the time the chain broke there was no sudden strain put upon it; that there was apparently no kink in the chain; that nothing else gave way, and that as far as could be seen, the link, which was the link next to the large link at the end of the chain, broke without warning; . . . that this link broke because of a defective weld at one end." The link was broken in two places, in one of which, it was testified, the iron was partially crystallized; but the evidence tended

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to show that this break was subsequent to the break at the weld, and was caused by the additional strain put upon the link when the weld parted. The beam had been lifted from the ground and was being swung around by Hayes so that it could be placed upon his team; he had hold of the beam with his hands, no tag rope being used, when the chain broke and he was crushed by the falling beam; and, although conscious for some period of time, he died in three hours after the injury. The work was being done by a gang of three men known as a "riveting gang," with the assistance of Hayes, who was a teamster.

The fact that the chain which in good condition would sustain a load of thirty-five hundred pounds broke under a load of only eighteen hundred pounds when there was no sudden or unusual strain upon it, warrants the conclusion that the chain was defective, and we do not understand the defendant to argue to the contrary.

One ground of the defence is that this chain was selected by a fellow servant of Hayes from a number of chains furnished by the defendant, among which were many suitable to use in hoisting this beam. And the defendant invokes the doctrine that when the master furnishes tools of which some are proper for the work in hand and others are not, he is not answerable to his servant for the negligent selection of an unsuitable tool by a fellow servant; and this was seemingly the ground upon which the trial judge directed a verdict for the defendant. But this doctrine is only one application of the general doctrine that at common law a master is not answerable to a servant for injuries caused by the negligence of a fellow servant; and hence, where the fellow servant in the exercise of such care as reasonably may be expected of him innocently selects a defective tool, the reason for the rule fails and the rule is not applicable. If this chain when in proper condition would have been suitable and the fellow servant, using such care as reasonably might be expected of him as such, did not discern the defect, then there was no negligence upon his part and the defendant is not excused by the fact that there were on the spot other chains furnished by it which were suitable. *Ford* v. *Eastern Bridge & Structural Co.* 193 Mass. 89, and cases there cited. Upon the evidence the question of the due care of the fellow servant who made the selection was

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for the jury. Therefore the ruling that upon the evidence the plaintiff could not recover cannot be sustained upon the ground stated by the trial judge. But inasmuch as the ruling was general it must stand unless the plaintiff can show some ground upon which his case should have been submitted to the jury.

There was evidence that the defendant "bought the best chains in the market"; that "this chain was probably bought as a whole and was then cut up into pieces; that larger links were forged in at the end, and the shorter chains thus made were then put in various racks about the shop to be used for whatever purpose might be deemed necessary; that nothing further was done with them as far as the care of them was concerned"; and that "the chain was not tested by the defendant . . . after it was purchased, but was supposed to be a tested chain when purchased." The defendant contends that having purchased its chains of reputable dealers in the open market, which were supposed to be tested, it cannot be held answerable for a latent defect. In order to see to what extent the defence can rest upon this ground it is necessary to look still further into the evidence. There was evidence that this chain was a part of a longer chain; that after its purchase by the defendant the large link at the end had been inserted into the link which afterward broke; that to make this insertion the latter had been opened and, the larger link then having been inserted, was closed by a weld; and that all this was done by the defendant. If that was so, then the defendant was not to be excused by the fact that the chain was sound when it was bought, but was answerable for any negligence in making the weld. *Haskell* v. *Cape Ann Anchor Works*, 178 Mass. 485. It was answerable even if the neglect in making the weld was that of a fellow servant; it could not relieve itself of the duty to use care that the chain should be safe by entrusting the work to a fellow servant of Hayes. The hand of the smith who made the weld was the hand of the defendant. Upon the evidence the jury might have found that when purchased the longer chain of which the chain in use at the time of the accident was a part was in sound condition; that when the longer chain was cut up and this part was being fitted for use a large link was added to one end of this part; that in doing this the link which broke was opened and

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then, after the large link had been inserted, was closed by this weld; that the weld was defective by reason of the carelessness of the smith who made it; and that the breaking of the link was due to that defect. Upon this ground at least, we are of opinion that the plaintiff had the right to go to the jury on the question of the defendant's negligence.

Upon this view of the case it becomes unnecessary to consider whether any other negligence on the part of the defendant is shown.

Exceptions sustained.

JAMES GLENNON (afterwards LOUISA GLENNON, administratrix,) *vs.* EDWARD W. EVERSON & another.

Suffolk. November 15, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability, In construction of building.

A man employed to watch over Saturday night and Sunday an unfinished temporary wooden building open at the ends, who, knowing that the building is not ready for occupancy, goes into it during an unusually severe gale to take out a pick and shovel and is injured by the building being blown over and collapsing, where it does not appear that the collapse of the building was due to any negligence in its construction, cannot recover against his employer for his injuries.

In an action for personal injuries from the collapse of a wooden building the fact that wire nails, which it appears are in general use, were used in the construction of the building is not evidence of negligence.

TORT for personal injuries sustained while in the employ of the defendants on November 24, 1901. Writ dated January 23, 1902.

In the Superior Court the case was tried before *Schofield*, J. The plaintiff between one and two o'clock in the afternoon of Sunday, November 24, 1901, being at the time twenty-seven years of age, was injured by the collapse of a structure on St. Alphonsus Street in that part of Boston called Roxbury. This structure was an unfinished wooden building intended to be used in connection with sewer work in which the defendants then were engaged, and was to contain the engines, boilers, pumps

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and other machinery used in the work. The plaintiff was put in charge of the unfinished building as a watchman to look after it on Saturday night and Sunday. He testified that on Saturday afternoon, after he had been told to watch the building, he went home and got his supper and came back just about dark, but there was no one there then; that he took one of the lanterns and walked around all that night until the next morning; that on Sunday morning he got his breakfast and came back again and was around the building until about one o'clock, when "I happened to look in from the upper end and I see this pick and shovel, and I knew I would be charged for it if it was lost, and I went in. I did not happen to notice it that day before until then. I started to pick it up. I got about one quarter in and I heard a crack and I made a grab for this plank, but I did not have time to pull it out before the building came down." "That the wind started up pretty hard that Saturday night before Sunday; that it started up about eleven o'clock and that it blew all night long pretty hard; that the wind was coming up St. Alphonsus Street straight against the side of the building, and the building just tipped right over."

For twelve or eighteen hours before the accident there had been a northeast storm. The plaintiff testified: "It was kind of blowing, about five o'clock I should say it started, it may be somewhere, around, during the afternoon, it was blowing and then started in to blow quite hard till around about twelve o'clock or so. It blew pretty stiff during the night. It was still blowing at daylight and raining, blowing and blowing pretty hard."

The incompleted structure was open at both ends. There was some question whether all the roof was on. The plaintiff was not sure that the sides were boarded the whole length.

It appeared that wire nails were used in the construction of the building. A carpenter, called as an expert by the plaintiff, testified that he was of the opinion that wire nails were unstable and unsafe for use in the framework of a building; that their resistance to lateral pressure in the framework of a building was not equal to that of the cut iron or cut steel nails. On cross-examination he testified that he was seventy years of age; that he gave up active work a few years ago; that he never saw the building in question; that he thought that the proportion of

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wire nails used to cut nails was about six to one; that he regarded the younger men in the building business as a pretty shiftless lot; that there was a sharp difference of opinion as to the use of wire or cut nails; that there was practically no difference in the cost. Experts, called by the defendant, testified that wire nails were safer and better than cut nails for use in the construction of buildings.

At the close of the evidence the judge ordered a verdict for the defendants; and the plaintiff alleged exceptions.

The trial was on February 23, 1905. On July 18, 1905, the plaintiff died, and on January 15, 1906, the administratrix of his estate was allowed to appear and prosecute the action.

W. H. Shea, for the plaintiff.

A. H. Russell, for the defendants.

HAMMOND, J. The verdict for the defendants was rightly ordered. There was no evidence of their negligence. The building was not finished and the plaintiff knew it. It was left open at the ends, and the plaintiff was not justified in assuming that it was ready for occupancy. It was standing in an exposed position and the wind was blowing very hard. It does not appear that the plaintiff was expected to take shelter in the building or to enter it. It cannot be held that the use of wire nails was evidence of negligence. They are quite generally used. This is simply a case where an unfinished building succumbs to an unusually severe gale. It does not appear that this was due to any negligence of the defendants.

Exceptions overruled.

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SUSAN E. WALSH *vs.* HENRY A. BROWN.

Suffolk. November 15, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Trespass. Officer. Attachment. Bond. Waiver.

If an officer in the service of a writ authorizing him to attach the goods and estate of a certain person enters a lunch room owned and maintained by that person and kept open night and day, and, after making an attachment of goods found therein and putting a keeper in charge, proceeds to put a lock and staple on the door and, for a period of eighteen hours, to exclude the proprietor whose goods he has attached and his servants and also customers wishing to enter, such acts of exclusion are in excess of his authority and make him a trespasser *ab initio*.

If an officer authorized to make an attachment after making the attachment exceeds his authority and thereby becomes a trespasser *ab initio*, the person whose goods he has attached does not waive the trespass by giving a bond to dissolve the attachment, and after doing so still has a right of action against the officer.

Semble, that a bond to pay a judgment, given under R. L. c. 167, § 116, to dissolve an attachment, is valid and binding even if the attachment was not effective.

TORT for unlawfully entering the plaintiff's lunch room in a store numbered 374 on Hanover Street in Boston, seizing and taking possession of that place of business of the plaintiff and preventing the plaintiff from conducting business there for about eighteen hours, with a second count for the conversion of certain goods of the plaintiff. Writ in the Municipal Court of the City of Boston dated June 8, 1903.

On appeal to the Superior Court the case was tried before *Wait*, J. It appeared that the defendant was a constable in the city of Boston, and that on May 22, 1903, he attached one of the stores of the plaintiff on Hanover Street in Boston, in which she was conducting a lunch room, "run night and day," on a writ issuing from the Municipal Court of the City of Boston in favor of one Cornelius Mahoney, and put a keeper in possession thereof for about eighteen hours, when the plaintiff gave a bond to dissolve the attachment, and the defendant and the keeper withdrew.

It further appeared that the defendant while in possession took cash from customers who had purchased food, and also at the time of the attachment removed part of the money from the cash register, ordered the husband of the plaintiff and her em-

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ployees out of the store in the evening, and put a lock and staple on the door leaving the keeper therein during the night.

The plaintiff contended that the writ under which the attachment was made was returned to court on June 4, 1903, although returnable on May 30, 1903. The defendant testified that he returned the writ to the court on May 29, 1903; the writ, however, never was entered in the court, but was placed among the non-entries.

The plaintiff asked the judge to make the following rulings:

1. The writ in Mahoney *v.* Walsh not having been entered in court, the writ is no justification for any acts done in consequence of that writ.

2. That as the writ in Mahoney *v.* Walsh was not returned to court on the return day mentioned therein, or on the Monday following, nothing done under it justifies the acts of the defendant in the premises of the plaintiff.

3. The defendant, although having in his possession a writ, which might justify his acts in attaching the goods and chattels of the plaintiff, by putting on a lock and driving a staple in the door, and denying the plaintiff possession, exceeded his authority, therefore the writ is no justification.

4. The acts of the defendant in interfering, ejecting and preventing the customers of the plaintiff from entering the premises made the defendant a trespasser therein.

The judge ordered a verdict for the defendant, stating that he did so in order that the questions of law involved might be presented to this court. The plaintiff alleged exceptions.

E. B. Callender & E. M. Shanley, for the plaintiff, submitted a brief.

J. L. Sheehan, (*J. S. Cannon* with him,) for the defendant.

HAMMOND, J. The defendant, a constable in the city of Boston, received a writ sued out by one Mahoney against Susan E. Walsh, the plaintiff in this action. The writ instructed him to attach the goods and estate of the said Walsh, to the amount of $110. Armed with this document he proceeded to a lunch room owned and kept by her but under the immediate management of her husband, and, as stated in his return, attached "certain goods and chattels . . . placed a keeper over said property and took from cash register $12.93." Neither in his

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return nor in the evidence at this trial is there any more specific description of the goods and chattels which were attached. If the officer had stopped there perhaps he would have been justified by his writ taken in connection with the provisions of R. L. c. 167, § 43. But he did not stop there. There was evidence that the store was "run night and day." It appeared that the defendant "ordered the husband of the plaintiff and her employee out of the store in the evening, and put a lock and staple on the door leaving the keeper therein during the night." From some time in the early evening of the day of the attachment until ten or eleven o'clock the next forenoon, he kept the store locked up and prevented all access to it. There was evidence also that before the closing of the store he forcibly prevented customers from coming in. Against the exclusion of the customers, the closing of the store and the exclusion of the husband and servants of the plaintiff, the plaintiff, through her husband, protested, but finally yielded.

It is plain that in these various acts of exclusion and in the locking up of the store the defendant went beyond the authority of his writ and of the statute above named; and no citation of authorities is needed in support of the proposition that such a public officer exceeding his authority becomes a trespasser *ab initio*.* The third and fourth requests should have been given. The trespass was not waived by the subsequent giving of a bond to dissolve the attachment. The bond is not before us, but we assume it to be the statute bond to pay the judgment, and that it is good whether or not there has been any substantial attachment. The defendant in the writ may have preferred in that way to avoid all further trouble about the possession of her store, but it cannot be held to estop her from a claim for damages as to the past trespasses. There being evidence of a trespass the plaintiff had a right to go to a jury.

Since the exceptions must be sustained upon this ground it is unnecessary now to consider the exception concerning the filing of the writ.

Exceptions sustained.

* For the other branch of the rule in the *Six Carpenters' Case*, that one who has entered a close under a license from the owner does not become a trespasser *ab initio* by committing unlawful acts after his entry, see *Beers* v. *McGinnis*, 191 Mass. 279; *Feeley* v. *Andrews*, 191 Mass. 313.

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KATHARINE C. BOYNTON & another *vs.* GEORGE H. GALE, executor.

Essex. November 19, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, SHELDON, & RUGG, JJ.

Trust. Gift. Equity Jurisdiction, To establish trust.

In this Commonwealth a mere declaration of trust by a voluntary settlor, which is not communicated to the donee and assented to by him, is not sufficient to perfect a trust, especially where the property is retained by the person making the declaration subject to his own control.

A bill in equity against an administrator to establish a trust alleged that by mistake a legacy was made to the defendant's intestate absolutely which had been intended to be left to him in trust for the plaintiffs, that the intestate learning of the mistake declared that he would hold the legacy in trust for the plaintiffs and so informed the parents of the plaintiffs, who then were of tender years, and promised their parents that he would pay over the trust fund to the plaintiffs when they should come of age, that he afterwards received the legacy and invested it in bonds of the United States and informed the father of the plaintiffs of that fact and that he held the bonds in trust for the plaintiffs. On demurrer it was *held,* that the bill set forth no trust.

BILL IN EQUITY, filed in the Superior Court on September 8, 1903, against the executor under the will of Mary H. Gale, late of Newburyport, alleging that Mary Green Gale, late of Manchester in the State of New Hampshire, died at Manchester in or about January, 1876; that shortly before her death she made her last will, disposing of a large estate, in which, among numerous other legacies, the sum of $2,000 was bequeathed to Stephen Madison Gale, of Newburyport, who was her brother in law and the grandfather of the plaintiffs; that this bequest was intended to be written and made in trust for the benefit of the plaintiffs, who were then infants of tender years, to be paid over to them when they should become of age, but by inadvertence and mistake of the person writing the will the bequest was not so expressed to be in trust; that after this will had been executed, Mary Green Gale discovered the inadvertence and mistake and requested the members of her household to inform Stephen Madison Gale thereof, and that the sum was intended to be given him in trust, as aforesaid, and that it was her will that he should so

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hold the same in trust, and further requested that he be requested to hold the same on the trust aforesaid; that Mary Green Gale died a few days after the execution of the will and before her requests and intentions as to the bequest could be communicated to Stephen Madison Gale; that soon afterwards such members of her household made known to Stephen Madison Gale the inadvertence and mistake, and that the $2,000 was intended by the testatrix to be given to him in trust as aforesaid, and the request of the testatrix that he so hold the sum, and he thereupon and afterwards at divers times, both before and after the probate of the will, declared that he so would hold the $2,000 in trust for the plaintiffs, according to the intention and request of the testatrix, and so informed such members and the parents of the plaintiffs, and promised the parents to pay over the trust fund to the plaintiffs when they should become of age, according to the intention of the testatrix; that the will of Mary Green Gale was probated and the $2,000 was paid over to Stephen Madison Gale, who afterwards declared that he held, and informed the parents of the plaintiffs that he held, the $2,000 in trust, as aforesaid, and would pay over the same to the plaintiffs, as aforesaid, when they should become of age; that after he had received this sum Stephen Madison Gale informed the father of the plaintiffs that he had invested the $2,000 in bonds of the United States of America, and held the same upon the trust aforesaid; that Stephen Madison Gale invested the $2,000 in bonds of the United States and held the same at the time of his decease, and that they were the only bonds of the United States held by him; that Stephen Madison Gale died in January, 1882, at Newburyport, intestate, long before the plaintiffs, or either of them, became of age; that Mary H. Gale, his widow, was appointed and was the administratrix of his goods and estate, and the bonds came into her hands and possession as such; that she as administratrix distributed the residue of the estate of Stephen Madison Gale, after the payment of debts and charges of administration, to herself, to George How Gale, son, and Anna Bartlett Boynton, daughter, of Stephen Madison Gale, who were the only distributees of his estate; and that the share of Mary H. Gale was much more than the amount of the trust fund; that after the decease of Stephen Madison Gale, Mary H. Gale, who was the grandmother of the

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plaintiffs, both before and after her appointment as administratrix, declared that she would fulfil the trust obligation, but neglected and failed so to do; that Mary H. Gale has deceased, testate, and that George How Gale is the executor of her will; that the estate of said Mary H. Gale is amply sufficient to pay all obligations that there are or may be against it, including such as are on account of this trust fund; that no part of the trust fund or any income thereof ever has been paid over to the plaintiffs or either of them; that the plaintiffs are now of age, and have but recently learned of the trust and of their rights under it; that the defendant, though requested to fulfil the terms of the trust, and pay over the trust fund to the plaintiffs, has neglected and refused and still neglects and refuses so to do; praying that the defendant may be adjudged and declared to be trustee for the plaintiffs of the trust fund; that an account be taken of the amount of the trust fund; that the defendant be directed and required to pay over to the plaintiffs such amounts as are justly and equitably due to the plaintiffs; and for further relief.

The defendant demurred to the bill. In the Superior Court *Stevens*, J. sustained the demurrer and made a final decree that the bill be dismissed with costs to the defendant. The plaintiffs appealed.

The case was submitted on briefs.

H. I. Bartlett, for the plaintiffs.

J. H. Casey, N. N. Jones & E. Foss, for the defendant.

HAMMOND, J. The legacy to Stephen Madison Gale was absolute and free of trust notwithstanding the wishes of the testator. The language of the will settles that. The property being absolutely his, there was no trust unless created by him as a voluntary settlor. The bill alleges upon this point in substance that after the death of the testatrix the legatee, upon being informed of her intention at the time of the execution of the will as to the legacy, declared that he would hold the legacy in trust for the plaintiffs and informed the parents of the plaintiffs who were then of tender age, and promised the parents that he would pay over the trust fund to the plaintiffs when they should become of age; that he afterward received the legacy and invested it in bonds of the United States and informed the plaintiffs' father of the fact and that he held the same upon the

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aforesaid trust. This was not enough. As before stated, he was a voluntary settlor. He never parted with the bonds, but always held them in his own possession, subject to his own disposal. There was no delivery to a third person, nor was there any notice to the plaintiffs. Whatever may be the doctrine elsewhere, it is settled in this State that a mere declaration of trust by a voluntary settlor, not communicated to the donee and assented to by him, is not sufficient to perfect a trust, especially where the property is retained by him subject to his own control. The notice to the plaintiffs' parents was not notice to the plaintiffs. *Welch* v. *Henshaw*, 170 Mass. 409, and cases cited. *Sherman* v. *New Bedford Five Cents Savings Bank*, 138 Mass. 581, and cases cited. See also *Bailey* v. *New Bedford Institution for Savings*, 192 Mass. 564, and cases cited.

Demurrer sustained; decree affirmed.

MARY E. MILLMORE *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 20, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence. Street Railway. Carrier.

The reasonable care which a common carrier of passengers must exercise toward a passenger is the highest degree of care which is consistent with the proper transaction of its business.

At the trial of an action by a woman against a street railway company for injuries caused by the sudden starting of a crowded open car of the defendant on a very dark night while the plaintiff was on the running board picking up a bundle from the floor of the car before alighting, it is error for the presiding judge to instruct the jury that the highest degree of care required from the defendant as a carrier of passengers made it the duty of the conductor before starting his car to move even to the extent of getting off the car to see whether the plaintiff had got off. The true rule is that in such a case a conductor before starting his car is bound to know, if by the exercise of due care, caution and diligence in the discharge of his duties he can know, whether any person is getting on or off the car.

The fact that a conductor of a street car has waited a reasonable time for a passenger to get on or off the car does not give him the right to start the car until

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he has exercised the highest degree of care consistent with the performance of his other duties to see that the passenger is on or off the car as the case may be.

TORT against a street railway company for personal injuries incurred while the plaintiff was a passenger on an open electric car of the defendant from being thrown to the ground by the sudden starting of the car as the plaintiff was attempting to alight from it. Writ dated September 15, 1903.

At the trial in the Superior Court before *Bond*, J. the jury returned a verdict for the plaintiff in the sum of $3,600. The defendant alleged exceptions, including an exception to a portion of the judge's charge which is quoted in the opinion and another exception to another portion of the charge relating to damages which the decision of the court has made immaterial.

E. P. Saltonstall, (*S. H. E. Freund* with him,) for the defendant.

T. F. Vahey, for the plaintiff.

HAMMOND, J. The plaintiff, a woman fifty-six years old, testified that she took in Boston an open car of the defendant which was bound for Watertown; that she sat in the sixth seat from the rear of the car, on the extreme left hand, and had a bundle and hand bag with her; that a number of men afterwards boarded the car "at a point before the one where she intended to alight," and that some of the men remained standing; that she desired to get off at Royal Street in Watertown, and upon her signal to the conductor he stopped the car there; that she got down on the left hand running board and then for the first time attempted to pick up the bundle which she had placed upon the floor of the car; and that while she was in that position the conductor started the car, by reason of which she was thrown to the ground and injured. She was corroborated by several witnesses as to what occurred after she boarded the car. One Blakeney testified that at the time of the accident he was engaged in a dispute with the conductor as to whether the witness had paid his fare. The evidence showed that the accident took place at a few minutes before eleven o'clock, P. M., on Saturday, July 18, 1903, and that the night was very dark. At the time of the trial the conductor was dead, and it was agreed that the only statement made by him before his death was that

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contained in his report made out at the time of the accident, to the effect that "he did not see the lady fall, but was told by another passenger that she had fallen."

It was contended by the defendant that the conductor had waited a reasonable length of time before starting his car, and that under all the circumstances, considering the number of passengers and the length of time that he had waited, it was a question for the jury whether before starting the car he had not done all that was required of him. Upon this point the judge, after stating the question to be whether the conductor exercised "the highest degree of care that could be exercised under the circumstances to see that she [the plaintiff] had an opportunity to get off and the car was not started until she had had that reasonable opportunity to get off and to take her bundles off," proceeded thus: "But the highest degree of care would require the conductor to move if he was not in a position to see whether the passenger was off; the highest degree of care would call upon him to move, and even to the extent of getting off his car if he could not do any other way, to see whether a passenger was off. The question whether the conductor did all he could to see — it is for you to consider. But he ought not to have started the car until the passenger had an opportunity to get off and a reasonable opportunity, and he should have looked out to see whether she was off. It was not enough that he waited a certain length of time." At the close of the charge the defendant specifically objected to that portion of it wherein it was stated in substance that the highest degree of care required the conductor to move even to the extent of getting off his car to see whether a passenger was off. We have no doubt that in many cases a jury might find that a conductor should move from his car to ascertain whether a passenger was fairly off or fairly on the car. But we understand that by the language of which the defendant complains the judge meant that as matter of law a conductor of a street car does not come up to the requisite degree of care unless he actually sees whether the passenger is fairly off or fairly on the car, as the case may be.

Common carriers are not the insurers of the life or the safety of their passengers. They are held to reasonable care only; and, briefly stated, that care when applied to them means the highest

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care consistent with the proper transaction of their business. As to the nature of this care, the following language by Knowlton, J., in *Dodge* v. *Boston & Bangor Steamship Co.* 148 Mass. 207, 218, is instructive: "Difficulty in the application of this rule has sometimes come from an improper interpretation of the expressions 'utmost care and diligence,' 'most exact care,' and the like. These do not mean the utmost care and diligence which men are capable of exercising. They mean the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business. Among these are the speed which is desirable, the prices which passengers can afford to pay, the necessary cost of different devices and provisions for safety, and the relative risk of injury from different possible causes of it. With this interpretation of the rule, the application of it is easy. As applied to every detail, the rule is the same. The degree of care to be used is the highest; that is, in reference to each particular it is the highest which can be exercised in that particular with a reasonable regard to the nature of the undertaking and the requirements of the business in all other particulars."

Applying this to the action of the conductor, it will be seen that on the one hand the rule is not that the conductor of a street car, after waiting a reasonable time for a passenger to get on or off, as the case may be, may start without taking any pains to see whether the passenger is either on or off. The conductor has not performed his duty when he has simply waited a reasonable time. He must exercise reasonable care, as above defined, to see that the passenger is on or off the car. On the other hand, the rule is not that he must absolutely see whether the passenger is on or off. In this, as in every other detail, there is resting upon him the same degree of care, namely, the highest care consistent with the proper transaction of the business; and, if he has exercised that degree of care, he has not been negligent. In the case before us that was the degree of care imposed upon this conductor. The plaintiff has cited to us several text books and cases in support of the proposition laid down by the trial judge in this case, but in many of them it is plain from the context that when the court says that the conductor must see that the passenger is on or off the meaning is that he must use the

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highest degree of care to see it. See, for instance, the language of Fuller, C. J., in *Washington & Georgetown Railroad* v. *Harmon*, 147 U. S. 571, 582. The rule is properly stated in *North Chicago Street Railroad* v. *Cook*, 145 Ill. 551, 557, a case cited by the plaintiff: "Carriers of passengers are held to the exercise of the utmost or highest degree of care, skill and diligence for the safety of the passenger that is consistent with the mode of conveyance employed. The car or train was in control of the conductor, and he was required to know, if by the exercise of due care, caution and diligence in the discharge of his duties he could know, whether any person was attempting to get on or off his train or car, before permitting the same to start in such manner as would be liable or likely to injure a person so getting on or off the same." This rule seems to us to be correct on principle and supported by the weight of authority, and so far as there are decisions elsewhere to the contrary we cannot follow them. We therefore think that the language excepted to was an erroneous statement of the law.

There is some ground for saying that this error was corrected by the court in a subsequent part of the charge, and so no harm was done to the defendant. A careful view of the whole charge, however, satisfies us that the error was not corrected, and the fact that the presiding judge did not strike out or modify the erroneous part even after his attention was specially called to it by the defendant's exception at the close of the charge, indicates that the judge still adhered to it as a view of the law by which the jury should be guided, and that the jury may properly have so understood. There was a mistrial.

The conclusion to which we have come on this part of the case makes it unnecessary to consider the other exceptions.

Exceptions sustained.

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MABEL E. WALLACE *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. November 22, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Infant. Next Friend. Judgment, Entry of. *Practice, Civil*, Entry of judgment.

In an action for personal injuries by an infant, brought for him by his next friend, if a reasonable settlement of the case is made fairly and both the next friend and the defendant desire to reduce it to judgment, and the plaintiff's counsel of record who has been informed of the settlement makes no objection to it, whereupon an agreement in writing for the entry of judgment and judgment satisfied is signed for the plaintiff by his next friend and is filed in court by the counsel for the defendant without signing it, the agreement is binding on the parties and the case is ripe for judgment.

Where a case in the Superior Court is ripe for judgment under R. L. c. 177, § 1, requiring that on the first Monday of every month judgment shall be entered in all actions ripe for judgment unless the court otherwise orders, the judgment goes into effect on the first Monday of the following month, even if the clerk fails to note that fact on the docket, and, if the clerk has made an unauthorized entry of judgment at an earlier date, this is immaterial.

PETITION of Mabel E. Wallace, a minor, by her mother and next friend, Josie Wallace, filed in the Superior Court for the county of Middlesex on June 17, 1904, to amend the record in the case of Wallace *v.* Boston Elevated Railway, No. 6078, on the docket of that court, and praying that an alleged agreement for judgment be put off the files and destroyed and that the case be brought forward on the docket to stand for trial.

At the hearing upon the petition in the Superior Court before *Lawton*, J. the following facts appeared in evidence:

The docket record in the case numbered 6078 was as follows:

"Henry C. Long 6078 Mabel E. Wallace *p. p. a. v.* Boston Elev. R'l'y Co. R. A. Sears.

"1903. Dec. Decl. Jury claim by plff. Ans.

"1903. December 31 Judgt. for plff. for $1. without costs, &
(1903) Judgt. satisfied, by agt on file."

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The "agreement" referred to on the docket and filed among the papers of the case, was as follows:

"Commonwealth of Massachusetts.

"Middlesex, ss. Boston, 21 Dec. 1903

"Mabel E. Wallace *p. p. a. vs.* Boston Elevated Railway Company.

"Agreement.

"The above case having been settled, it is agreed that judgment may be entered therein for the plaintiff for one dollar without costs, and that entry may be made of judgment satisfied.

"James A. Murray
"Witness to signature.

James H. Wallace, Father and next friend of Mabel E. Wallace
Attorney for

"Attorney for Defendant."

The action, No. 6078, was brought by the present petitioner, by her father, James H. Wallace, as her next friend, to recover damages for the loss of the lower part of one of her legs which was injured by a car of the defendant. The plaintiff appeared by Henry C. Long, Esquire, an attorney at law, whose appearance is recorded upon the docket record above given. The defendant did not regard itself as liable in the action and never had made any attempt to settle the case or made any offer of settlement.

On December 21, 1903, the father went to the office of the defendant and requested the attorney of the defendant to settle the case with him, saying that he wanted to buy his girl a cork leg, which would amount to $175, for a Christmas present, and wanted the defendant to settle for that sum. The attorney for the defendant told him that the plaintiff had counsel and he, the defendant's attorney, would not talk with him, the father. The father said he was going to discharge the counsel. The attorney again told him to go and see his counsel, but on the father's insisting upon talking about the case the attorney for the defendant called up on the telephone the counsel for the plaintiff and told him that the father was there and wanted to settle the case and that he, the defendant's attorney, had refused to settle the case with him and had told him to go to his counsel, and that the father had said he was going to discharge the counsel,

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and that the father had said he would not have Long for counsel anyway. The judge found that this was tantamount to a discharge of the attorney Long.

The attorney for the defendant said to the plaintiff's attorney that the plaintiff had no case, but that the injury was so great that the defendant would be willing to pay enough to purchase the child a cork leg. Mr. Long said, "Well, go ahead and settle with him but save me out my bill of $150." The attorney for the defendant said he would not pay so much, that that was more than the case was worth and that it was a case where the road was not at fault. The attorney for the defendant told Mr. Long he was going to pay the plaintiff $175 in settlement of the action, and would pay the plaintiff's attorney his bill.

The attorney for the defendant paid the father $175 in settlement of the action and told him that he would pay the attorney's fees so that the sum would be clear for the plaintiff, and he paid the plaintiff's attorney $50 in settlement of his bill. Two releases were executed, one by the father as father and next friend of the child, and one by the father personally. The $175, except $2 of it, was paid by the father to the mother, the next friend in this petition. The appointment of the father as next friend never was revoked. The appearance of the counsel for the plaintiff never was withdrawn.

It was at the time of this settlement that the agreement printed above was signed by the father and by the witness to his signature. The agreement was filed by the defendant in the case, No. 6078, without any signature in behalf of the defendant. Thereupon, without any special order of the court, the clerk made the entry of judgment to be found in the above copy of the docket record under the date of 1903, December 31. See R. L. c. 177, § 1; Rule 23 of the Superior Court.

The petitioner asked the judge to make the following rulings:

2. Under the evidence and record in this case the plaintiff is entitled to have the entry dated December 31, 1903, stricken from the record.

3. Inasmuch as the entry was unauthorized by special or general order of the court or by rule, no judgment has been given in the case.

4. Inasmuch as the agreement was not signed by the defend-

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ant the case was not ripe for judgment within the meaning of the rule and therefore the entry was unauthorized and should be stricken off.

5. The agreement having been signed by the next friend only and not by the counsel of record in the case, it was made without sufficient authority to render the case ripe for judgment and therefore the entry should be stricken off.

6. As a result of the evidence it appears that the agreement was not such a one as in equity and good conscience ought to bind the plaintiff. The court, therefore, will not sustain it and the entry based upon it should be stricken off.

7. A minor party to a suit in court is represented in court by his attorney of record, and no judgment by consent should be entered against such a party without the consent of his attorney of record.

8. The written agreement not being signed by the defendant or its attorney remains an agreement made by the next friend *in pais* and is therefore not binding upon the plaintiff under the decision of *Tripp* v. *Gifford*, 155 Mass. 108.

9. Upon all the evidence in this case the petitioner is entitled to have the record amended according to the prayer in the petition.

10. Upon the evidence in this case the court legally in the exercise of its discretion may amend the record according to the prayer of the petition.

The judge refused to make any of these rulings. He gave as the ground for refusing to make the rulings numbered 2 and 3, that they were not in accordance with the facts, and as the ground for refusing to make the ruling numbered 10, that it was not applicable to the facts found.

The judge found that the allegation that the father at the time he signed the agreement and received the money was intoxicated and mentally incapable was untrue, found that the settlement was such a one as the court would have approved had the matter been brought to the court's attention at the time of the filing of the agreement, and ruled that the court had the power to grant the relief prayed for (against the defendant's contention and objection), but also ruled that there had been a valid settlement of the case, and for that reason dismissed the petition. The petitioner alleged exceptions.

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A. L. Richards, (*T. Eaton* with him,) for the petitioner.

J. T. Hughes, for the respondent, was not called upon.

HAMMOND, J. At the hearing the judge found that the allegation that the father, who was the next friend, was intoxicated and mentally incapable at the time he signed the agreement, was untrue. No fraud or collusion was alleged. The powers and duties of a next friend in a case like this were considered in *Tripp* v. *Gifford*, 155 Mass. 108. In that case the following language is used by Barker, J.: "We see no reason why the next friend should not have authority to institute or to entertain negotiations for a settlement of the controversy. His position with reference to it is like that of a general guardian, or the guardian *ad litem* of an infant defendant. It is to be expected that he will act fairly and intelligently for the real interest of the plaintiff; but it cannot be said that every suit brought in the name of the infant is upon a good cause of action, or that, if well brought, the just amount of the recovery cannot be arrived at without a trial. . . . The next friend is intrusted with the rights of the infant so far as they are involved in the cause, and acts under responsibility both to the court and the plaintiff. It may well be considered to be within his official duty to negotiate, if possible, a fair adjustment, without subjecting the plaintiff to the expense and risk of a trial.

"When, however, he assumes finally to conclude a settlement out of court, and to discharge the cause of action by an agreement *in pais*, under which he accepts less than the plaintiff's entire demand, he does more than is clearly within his authority to prosecute the action, and more than we think ought to be allowed with due regard to the protection of the infant. Unless such a settlement is affirmed, either in terms if brought to the attention of the court, or by an entry of judgment in regular course, it may fairly be held invalid. If it is not of such a nature as to commend itself to counsel, to whom, as well as to the next friend, the infant has a right to look for protection, it ought not to stand unless sanctioned by the court. It is no injustice to a defendant to hold that the infant is not concluded until the cause is disposed of by judgment."

In the case before us the judge found that certain acts of the next friend were tantamount to his discharge of the counsel

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whose name was upon the record as counsel for the plaintiff. Whether that be so or not, it does not appear that the counsel objected to the settlement, but on the contrary he seems to have been content with it. The agreement of settlement was signed by the next friend, and then was filed in court by the counsel for the defendant, who neglected to sign it. Thereupon, without any special order of the court, the clerk entered up judgment on December 31, 1903, the next day for entering up judgment under the statute (R. L. c. 177, § 1) in cases ripe for judgment being the first Monday in January, 1904. See Rule 23 of the Superior Court.

It is urged by the plaintiff that, the agreement not being signed by the counsel for the defendant, the judgment was for that reason invalid. But we do not think that position tenable. By filing the agreement the defendant indicated its assent and desire to have it ratified by the judgment of that court.

The judge before whom this petition was tried has found that the settlement was such a one as the court would have approved had the matter been brought to the court's attention at the time of filing the agreement. Here then is a reasonable settlement fairly made, and both the next friend and the defendant desire to reduce the same to judgment; and a paper containing an agreement for judgment is filed in court. Under these circumstances we think that after the agreement for judgment was filed the case was ripe for judgment under R. L. c. 177, § 1, and that therefore in law it went to judgment at any rate on January 4, 1904, under that statute. And that is so even if the clerk failed to note the fact on the docket. *Pierce* v. *Lamper*, 141 Mass. 20. It is immaterial that the clerk made an unauthorized entry of judgment at an earlier date. Under these circumstances the settlement was in law valid, the ruling of the judge to that effect was correct, and the petition was rightly dismissed for that reason.

We see no error in the manner in which the judge dealt with the petitioner's requests for rulings.

Exceptions overruled; decree dismissing petition affirmed.

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EUGENE M. PAINE *vs.* ARMOUR AND COMPANY.

Suffolk. November 22, 23, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence.

If the proprietor of a room for the sale of meats maintains a heavy door four or five inches thick opening from a refrigerating room, and a salesman of the proprietor invites a customer, who often has been through the door but has no reason to think that it will be opened quickly and violently, to come to a desk near this door to receive a slip showing the weight of his purchase, and the customer in stepping forward for this purpose is thrown down and injured by the sudden violent opening of the door due to the impetuosity of a servant of the proprietor when entering from the refrigerating room, in an action by the customer against the proprietor for his injuries thus caused there is evidence for the jury that the servant of the defendant in opening the door failed to exercise proper care to see that no one was injured.

If the proprietor of a room for the sale of meats maintains a heavy door four or five inches thick opening from a refrigerating room, and a salesman of the proprietor invites a customer, who often has been through the door but has no reason to think that it will be opened quickly and violently, to come to a desk near this door to receive a slip showing the amount of his purchase, and the customer in stepping forward for this purpose is thrown down and injured by the sudden violent opening of the door, which is made probable or necessary by the fact that the door has been bound at the bottom owing to the settling of the building so that it rubs against the floor, and this condition of things has existed for some time and has kept growing worse, in an action by the customer against the proprietor for his injuries thus caused there is evidence for the jury that the defendant has failed to take proper care for the protection of his customers against the violent opening of the door.

TORT for personal injuries from being struck by the heavy door of a refrigerator when suddenly pushed open by an employee of the defendant at its place of business at 109 Clinton Street in Boston. Writ dated September 23, 1901.

At the trial in the Superior Court before *Richardson*, J. it appeared that the accident happened on July 24, 1901; that the defendant was a corporation engaged in the business of selling fresh meats; that the plaintiff had been in the provision business for himself and others in Boston for about thirty-two years; that at the time of the accident he was going to start in business for himself, and was buying goods for the new firm, and also for one Cann; that he went to the defendant's salesroom to buy

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lambs for Cann; that he had been going to the defendant's salesroom for three or four years; that he bought the lambs on the day in question, and they were run out on a track; that he saw them weighed, when the salesman said, "Here is your weight slip, Mr. Paine," and held it up over his shoulder; that the plaintiff stepped up to get it, and was knocked senseless by the door of the refrigerator; that the refrigerator was at the back of the room, the partition extending across the full width; that the track for carrying the meat came out through the door; that the scales showing the weight of the meat upon the track were against the partition, which was between the salesroom and the refrigerator upon the salesroom side; that directly under the scales was a desk where they made out the weight slips; that both the scales and the desk were just at the left of a person entering the refrigerator door; that the door was a very heavy one four or five inches thick; and that no warning whatever was given that the door was going to be opened.

On cross-examination the plaintiff testified, among other things, that the lambs were kept in the refrigerator; that he had been into the refrigerator to buy the lambs and then came out; that he had been in and out of this door a good many times; that the lambs were cut inside and brought out on the hooks on the track through the door, when the weighing was done at the scales; that after receiving the weight slip, which it was the practice to hand to the customer, the customer either would pay for the goods or would have them charged; that the clerk of whom he bought the lambs stood by the desk, and the plaintiff stood farther out in the room; that the clerk, standing at the desk, holding up the weight slip over his shoulder, said, "Here is your weight slip, Mr. Paine"; that he stepped up to get the slip, and as he did so the door came open; that he had been standing back while the weighing was being done, and stepped up to get the slip; that the door struck him on the right side and he landed on his back.

One Curtis, who at the time of the accident was in the employ of the defendant, was called as a witness by the plaintiff, and testified that it was he who pushed the door open when it struck the plaintiff; that he had been inside the refrigerator and was in the act of coming out; "that he used ordinary force to push

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the door open; it did not go open very easily; that there was a difference between the way this door opened and the doors of other refrigerators, because it bound at the bottom; it was difficult to open the door at times; that as the door swung around the floor was raised so it obstructed the door coming open free on its own axis, the outer edge of the door coming in contact with the floor; that the floor was worn away from the constant opening of the door; that this condition had existed when he came into Armour and Company's employ in June, 1900; that there was no change during this time; that the door afterwards was taken off and fixed and the floor hewn away; that later the building was raised up; that between the time he went there and the time of the accident the binding of the door upon the floor kept growing worse as the building settled; that considerable more exertion was required to open the door on the day of the accident than would be required in opening an ordinary refrigerator door."

At the close of the evidence the judge refused to rule that upon the evidence the plaintiff was not entitled to recover, and submitted the case to the jury. The jury returned a verdict for the plaintiff in the sum of $3,750, and the judge reported the case for determination by this court, with an agreement of the parties that if upon the evidence the plaintiff was entitled to go to the jury judgment should be entered on the verdict, but if the plaintiff was not entitled to go to the jury judgment should be entered for the defendant.

C. W. Bond, (*H. H. Bond* with him,) for the plaintiff.

W. S. Slocum, for the defendant.

HAMMOND, J. While this case is close, still we think that upon the evidence the jury might have found that the door which came in contact with the plaintiff was a thick, heavy door; that, when swinging in opening, it would pass over a part of the floor likely to be occupied by the defendant's customers; that the plaintiff was a customer and was standing upon this space by the invitation of the defendant, with no reason to think that the door would be quickly and violently opened; and that while he was thus standing the door was quickly and violently thrown open by the defendant's servant without any warning having been given. The jury may have further found either that this violent

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motion of the door was due to the impetuosity of the person who opened it, or that it was rendered necessary by the fact that the door sagged so as to rub against the floor, and that in that way unusual force was required to open the door, thereby rendering a violent opening probable or necessary; that if it was due to the first cause, the person who opened the door failed to exercise proper care to see that no one was injured; and if it was due to the second cause, the defendant had failed to take proper care for the protection of its customers against the violent opening of the door. Upon such findings the jury would have been warranted in finding that the plaintiff was careful and the defendant negligent. It is not the case of the usual opening of an ordinary door. Under the terms of the report there must be

Judgment on the verdict.

HOWARD SANDERSON *vs.* BOSTON ELEVATED RAILWAY COMPANY.

CHARLES W. ATCHISON *vs.* SAME.

Suffolk. November 23, 1906. — February 27, 1907.

Present: KNOWLTON, C.J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence. Street Railway.

Although there may be movements of an electric street car so violent that a mere description of them and of their results may justify the inference that they were attributable to negligence on the part of the carrier operating the car, yet the fact that a car, which has lessened its speed in approaching a stopping place and is moving slowly but has not reached the stopping place, gives a "plunge forward . . . as though the electricity of the motor or the power had been applied," which also is described by different witnesses as a "jump," a "kind of a lurch" and a "jar ahead to a considerable extent," in the absence of evidence of any defect in the car or the track or of incompetency of the carrier's servants, is no evidence of negligence to support an action against the carrier for injuries from a fall caused by such a movement.

TWO ACTIONS OF TORT for personal injuries respectively sustained by the plaintiffs when passengers on a car of the defend-

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ant on Dorchester Avenue in that part of Boston called South Boston from being thrown to the ground in the manner described in the opinion. Writs dated respectively August 12 and May 13, 1902.

In the Superior Court the cases were tried together before *Hitchcock*, J., who instructed the jury that there was no evidence in the cases which would justify the jury in finding the defendant negligent. He ordered a verdict for the defendant in each case, and the plaintiffs alleged exceptions.

C. C. Johnson, for the plaintiffs.

C. F. Choate, Jr., for the defendant.

HAMMOND, J. These actions of tort for personal injuries were tried together. The respective plaintiffs were passengers upon one of the defendant's open cars, which was proceeding northerly on the inbound track on Dorchester Avenue towards Boston; and the injuries were received when this car, between First and Second Streets, met a box car also belonging to the defendant, going in an opposite direction on the outward bound track. At the time the cars were passing each other Sanderson was knocked from the left hand running board of the open car, and Atchison, who was also standing upon the same board, was knocked off by collision with Sanderson as the latter fell.

Sanderson testified in substance that his destination was a coal office just north of First Street; that he was familiar with that line of cars; that he knew that the cars stopped only at white posts, and that there was no white post directly opposite the office; that he intended to alight from the car at the white post just north of First Street; that as the car passed Second Street the conductor called out First Street as the next stop; that thereupon he signalled the conductor to stop, and that just before the car came to First Street it "slowed down."

He testified that he had with him a package consisting of a ledger and papers, and some writing material, which during the ride he had placed between his back and the seat. He was seated at the extreme left end of the second seat from the rear of the car. The car was crowded, passengers being upon the rear platform and on each of the running boards. As to the manner of the accident he testified as follows: "As soon as I saw that the car was coming to a stop, I reached for the seat

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ahead and got on my feet, and I put my left foot out on to the running board; as I did I took hold of the handle that runs from the seat, the stanchion, that runs up, and I noticed in particular that just in front of the fender of the car about a foot or a foot and a half or two feet was a car coming out on the left [outward] track, coming out from the city. Just at the time I noticed that, I noticed a gentleman get off at the extreme front of the car, he cleared the car and apparently went away to the sidewalk. At that time I reached for my package which was on the seat. I had just practically about got it in my clasp, in my right hand, when immediately there was a plunge forward of the car. It seemed as though the electricity of the motor or the power had been applied. . . . It [the plunge] forced me backwards . . . and I lost my grasp with my left hand. I fell backwards, and since then I found out into somebody, at the time I didn't know what I struck, I struck something backwards and I sort of rebounded and I tried to recover on my feet again, and tried to regain my first hold, and in so doing I plunged to the left into the street. . . . I was knocked unconscious." Upon cross-examination he testified that nobody jostled against him, and he described in greater detail his movements. He further said that the car was moving slowly but had not stopped, nor had it reached the stopping place; and that he did not think it would stop until it reached there; that the conductor was upon the rear platform; that he [the witness] was the only one so far as he knew who was disturbed by the "plunge" of the car; and that although he was familiar with the accelerated motion caused by the sudden application of electricity, he "never experienced before any such jump as the one that occurred when I lost my grip."

The plaintiff Atchison testified that when he boarded the car he stood at first upon the right hand running board, but as the car proceeded and the passengers changed, he gradually worked around over the rear platform to the left hand running board, near the rear seat, where at the time of the accident he was standing; that he did not know Sanderson, and that the first he noticed was when the latter "shot up" his hand; that after the hand shot up the car "slowed down." He then continued: "After his [Sanderson's] hand shot up I noticed he had a paper,

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he folded and pushed a paper in his pocket and was about to rise, kind of got hold of the back of the seat in front of him and stood up. With that there was a man — . . . I saw the man that was standing in front of him or in front of me on the step move up in order to let Sanderson get out, and as he stood up and got hold of that handle and rose up on that, he looked out and he got hold of the . . . [stanchion], . . . got down there with two feet and looked up. . . . [He] got up and stood on the running board. He reached around and lifted up a ledger and had it in his hand and just then the car gave a jump and shook me a bit, and the first thing I knew somebody was thrown back into me, that was Mr. Sanderson that had got up out of his seat. [This coming back] pushed me tight up against the rod that was back of me, the stanchion rod. . . . It knocked my hat off. . . ." In answer to the question "What happened after that," the witness answered "I noticed him kind of struggling to get hold of something. . . . I don't know what struck me, but I . . . [saw] . . . the car coming towards me, and I put up my hand like that. . . . He tried to get his feet and he bounced forward like this, the other car catching him and throws him right back into me and his head caught my nose right here and up against the stanchion rod I went again, . . . [and] . . . I fell right off the car. . . ." The witness testified that this was the second time he was struck.

One of the witnesses for the plaintiff described the movement of the car as a "kind of a lurch," another as a "jar ahead to a considerable extent," "a movement such as you feel when the power is applied"; another, when asked how severe the forward motion of the car was, answered: "Well, I couldn't state how severe it was, simply that I bumped into the man behind me, and he came back on to me. . . . He came back good." There were quite a number of people upon each of the running boards, especially that upon the right; but while some testified that they were thrown back a little it did not appear that the movement was so great as to shake any of them off.

It is to be noted that the theory of the defence as to the way in which Sanderson was thrown from the car was entirely different, and there was evidence that there was no jerk of the car; but since the evidence was conflicting we are to treat the case

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upon the supposition that the jury might have believed the evidence of the respective plaintiffs.

Even if the plaintiffs' theory of the accident be adopted, the evidence discloses no negligence of the defendant. There does not appear to have been any evidence of defect in the car or tracks, or of incompetency of the defendant's servants. The car was moving slowly. The plaintiffs were not hurt by any movement of the car at the time and place when and where the defendant was ready to discharge passengers. Sanderson knew that the alighting place was not reached, and that the car would not stop until it reached there. He was accustomed to ride upon the electric cars and was familiar with their operation. There may be movements of a car so severe that a mere description of them and their results may justify the inference that they were attributable to some negligence on the part of the carrier, but the movement described in this case is not of that character. It was not due to any defect, and the possibility of such a movement is a thing which every one who gets upon a street car must be taken to contemplate. See *McCauley* v. *Springfield Street Railway*, 169 Mass. 301. The case must stand with cases like *Byron* v. *Lynn & Boston Railroad*, 177 Mass. 303, and *Timms* v. *Old Colony Street Railway*, 183 Mass. 193.

Atchison's case must fall with Sanderson's.

Exceptions in each case overruled.

EMIL LEBOURDAIS *vs.* VITRIFIED WHEEL COMPANY.

Middlesex. November 23, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence. Dangerous Article. Emery Wheel.

A workman in a factory who is injured by the bursting of a defective emery wheel bought by his employer in the open market cannot recover from the manufacturer of the wheel unless he shows that the manufacturer knew of the defect in the wheel when he sold it. It is not enough for him to show that the manufacturer sold the wheel in the open market without exercising reasonable diligence to discover whether it was defective.

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TORT by a workman in a factory for personal injuries caused by the bursting of a defective emery wheel manufactured and sold in the open market by the defendant and purchased by the plaintiff's employer. Writ dated May 9, 1905.

The declaration as amended was as follows:

"And the plaintiff says that the defendant is a corporation conducting the business of manufacturing and selling emery wheels; that on or about Thursday, February 24, 1905, the plaintiff, while working for the Merrimack Manufacturing Company, at Lowell, Massachusetts, and being entirely in the exercise of due care in the premises, was severely injured through the bursting or breaking of an emery wheel, bought in the open market by said Merrimack Manufacturing Company, which emery wheel had been manufactured and sold by the said defendant, and sent into the open market, to be used for the purpose for which, and in the manner in which, said emery wheel was being used at the time of said injury; that said emery wheel broke or burst, owing to a defect of structure or condition due to the negligence of the defendant, its servants or agents, which defect rendered it an article dangerous to use; that the condition of said article was known to the defendant, or could by reasonable diligence have been discovered by the defendant; that it was the duty of the defendant to so construct or manufacture the emery wheels which it sold or sent forth to be placed upon the open market, that no injuries due to such a defect therein might be suffered by the users thereof; that said accident was due to the fact that the defendant was wholly regardless of said duty, and negligent in placing such an article on the open market; that the plaintiff received severe and permanent bodily injuries and mental impairment, and suffered great pain and anguish of body and mind; that he has been put to great expense for medical attendance and nursing, and has been for a long time incapable of attending to any work or business; that he has been rendered incapable of earning his living, all to his great damage."

The defendant demurred to the declaration as amended. The Superior Court sustained the demurrer and gave judgment for the defendant. The plaintiff appealed.

C. J. Martell, for the plaintiff.

W. C. Cogswell, for the defendant.

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BRALEY, J. The manufacturer of an article of merchandise which he puts upon the market ordinarily is not responsible in damages to those who may receive injuries caused by its defective construction, but to whom he sustains no contractual relations, although by the exercise of reasonable diligence he should have known of the defect. If such an extended liability attached where no privity of contract exists it would include all persons however remote who had been damaged either in person or property by his carelessness, and manufacturers as a class would be exposed to such far reaching consequences as to seriously embarrass the general prosecution of mercantile business. In the usual course of trade upon making a sale, as the article passes from the ownership and control of the maker, it is held that when these cease his liability also should be considered as ended. *Davidson* v. *Nichols*, 11 Allen, 514. *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47, 48. *Glynn* v. *Central Railroad*, 175 Mass. 510, 512. But where by reason of its nature the article sold is commonly recognized as intrinsically dangerous to life or property, among which gunpowder, nitroglycerine and other highly explosive compounds, naphtha and poisonous drugs are some familiar examples, if the seller without notice of their dangerous or noxious qualities delivers them to a customer or to a carrier who is ignorant of these properties, he is liable not only to him, but to others to whom while in the exercise of reasonable care they are the proximate cause of injury. *Davidson* v. *Nichols*, 11 Allen, 514. *Carter* v. *Towne*, 98 Mass. 567. *Wellington* v. *Downer Kerosene Oil Co.* 104 Mass. 64. *Norton* v. *Sewall*, 106 Mass. 143. *Boston & Albany Railroad* v. *Shanly*, 107 Mass. 568. *Turner* v. *Page*, 186 Mass. 600. *Oulighan* v. *Butler*, 189 Mass. 287, 292. *Flynn* v. *Butler*, 189 Mass. 377, 388. *Thomas* v. *Winchester*, 2 Seld. 397. A similar liability exists where a caterer furnishes impure and unwholesome food by which the guests of his customer are made sick, or where a manufacturer or vendor knowingly sells for general use, without disclosing the existence of the defect, a machine, mechanical instrumentality or other article, which because of its defective construction or condition when put out causes injury. *Bishop* v. *Weber*, 139 Mass. 411, 417. *McDonald* v. *Snelling*, 14 Allen, 290. *Flynn* v. *Butler*, 189 Mass. 377. *Lewis* v. *Terry*, 111 Cal. 39. *Huset* v. *Case Threshing*

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Machine Co. 120 Fed. Rep. 865. *Clarke* v. *Army & Navy Co-operative Society*, [1903] 1 K. B. 155, 167. In all of these various transactions his liability does not rest on privity of contract, but the act itself is deemed not only a legal wrong, but may be said to be in violation of the duty he owed to those with whom he dealt, as well as of the implied duty which he owes to the community to refrain from the commission of acts of negligence whereby injury follows to its members in person or property. If damages are suffered he is responsible because they are such as reasonably should have been foreseen, though the exact way in which the accident is precipitated may be determined by a foreign cause. *McDonald* v. *Snelling*, *ubi supra*. *Flynn* v. *Butler*, *ubi supra*. *Huset* v. *Case Threshing Machine Co.*, *ubi supra*. *Lane* v. *Cox*, [1897] 1 Q. B. 415, 417. It is within the last exception, if the plaintiff has a right of action against this defendant, that it must be found.

The material averments of the declaration, which upon demurrer must be taken as true, are, that while the plaintiff in the exercise of ordinary care was using an emery wheel, it burst because of its defective condition, seriously injuring him, and that, when the defendant sold this wheel, not only its defective and unsafe condition was known, or by reasonable diligence could have been discovered, but its use also was known for the purpose and in the manner employed at the time of the accident. But these allegations are insufficient, for they simply set forth as the proximate cause of the injury the negligence of the defendant, or its servants or agents, in not exercising reasonable care to ascertain the condition of the wheel before putting it on the market. *Wellington* v. *Downer Kerosene Oil Co.*, *ubi supra*.

Judgment affirmed.

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PHILIP G. PEABODY *vs.* HARRIET E. ALLEN, administratrix.

Suffolk. December 3, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Executor and Administrator. Words, "May become."

On a petition to the Probate Court under Pub. Sts. c. 136, § 13 (now R. L. c. 141, § 13) to require the administrator of an estate to retain in his hands sufficient assets to satisfy a claim of the petitioner which "is or may become justly due" from the estate, the petitioner comes within the terms of the statute if he proves that he furnished the money for a joint venture of himself and the intestate on which there has been a loss, under an agreement by which the intestate was bound to pay the petitioner one half of the loss when ascertained, and that he is prosecuting a claim against a third person, whose liability is established, which when its amount is determined will diminish the amount of the deficiency, but probably will not extinguish it.

HAMMOND, J. This is a petition brought under the provisions of Pub. Sts. c. 136, § 13, (now R. L. c. 141, § 13,) to require the respondent, as administratrix of the estate of Elbridge G. Allen, to retain in her hands a sum sufficient to satisfy the claim of the petitioner upon which no right of action existed at the time when the petition was filed. The Probate Court made a decree in favor of the petitioner, and the case is before us upon an appeal by the respondent from a decree of a single justice of this court affirming that decree.

The statute provides that "a creditor of the deceased, whose right of action does not accrue within two years after the giving of the administration bond, may present his claim to the Probate Court at any time before the estate is fully administered; and if, on examination thereof, it appears to the court that such claim is or may become justly due from the estate, it shall order the executor or administrator to retain in his hands sufficient to satisfy the same."

The question is whether the claim of the petitioner is one which at the time of the filing of the petition could have been then described as one which "is or may become justly due" within the meaning of those words in the statute. The words "or may become" were inserted in the statute by St. 1879,

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c. 71. Before that amendment it was held in *Ames* v. *Ames*, 128 Mass. 277, that where the existence of a claim depended upon a future contingency it was not a debt justly due within the meaning of this statute (Gen. Sts. c. 97, § 8). In that case the contract upon which the claim was based provided for the payment of certain sums of money upon certain contingencies. At the time of the filing of the petition the contingencies had not happened, and there was no certainty that they would happen or that anything ever would be due under the terms of the contract; and it was said that "the provisions of [Gen. Sts.] c. 97, § 8, are confined to cases of creditors who have debts due from the estate, either payable presently or in the future. They do not extend to cases where the deceased has entered into a contract which may possibly result in a debt at some future time, but upon which there is no existing debt at the time of the application to the judge of probate."

The claim arises out of a contract between the petitioner and the intestate relating to the purchase of a certain parcel of real estate upon Buckingham Street in Boston. The estate had been purchased for $10,000, the money having been furnished by Peabody, the petitioner; and the agreement in substance provided that the profits and losses of the venture were to be shared equally between the parties. The house was sold at a loss. Between the purchase and the sale the value of the property had been adversely affected by the change of grade in that neighborhood under the right of eminent domain, and at the time of the sale there was a right to compensation against the railroad corporation which made the change. The house was sold for $7,128. The income from the property during the time it was held under this agreement was less than the amount of the interest upon the sum advanced by the petitioner and the expenses. There was therefore a loss unless the deficiency should be made up by the amount to be recovered from the railroad corporation, and there was an obligation on the part of the intestate to pay to the petitioner one half of the loss as it finally should prove to be. At the time of the filing of this petition a suit brought by the petitioner to recover the compensation was pending. Here then is an existing contract to pay to the petitioner one half of the loss incurred in a certain joint venture. The property has

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been sold at a loss. To make up the deficiency there is a claim existing against a third party, which claim the petitioner already is prosecuting in the proper court. The petitioner represented, and the decree of the court shows that the court agreed with him, that there was a probability that the claim against this third party when recovered would not make up the deficiency, and hence that under the terms of the contract some portion of the amount required to make up the deficiency would be justly due to the petitioner. At the time of the filing of the petition every element upon which the liability of Allen was based had become certain and fixed except the simple question as to the amount of the sum to be recovered from a third party whose liability also had become fixed. In a word, the liability of the estate as it finally should turn out to be was fixed by circumstances existing at the time of the filing of the decree. Is such a claim within the statute?

In two cases this court has touched upon the meaning of the phrase in question: *Bullard* v. *Moor*, 158 Mass. 418, and *Forbes* v. *Harrington*, 171 Mass. 386. In the first it was said by Holmes, J. that the "statute must be construed reasonably. It cannot have been intended to enable any one, who has an outstanding contract made by a deceased person, to suspend the settlement of the estate indefinitely, without regard to the probability of anything becoming due upon the contract, and when it still is impossible for the Probate Court to form any estimate of what amount should be retained as 'sufficient to satisfy the same' in the words of the statute."

The case at bar seems clearly distinguishable from these two cases. The language of the statute plainly implies that there may be at least some uncertainty as to whether or not the debt may be justly due; and while it may be difficult to give in advance any definition of the degree or kind of uncertainty allowable in a claim under the statute, it should be "construed reasonably," and it seems reasonable to hold that the statute included a claim like that of this petitioner where all the elements of liability were fixed except the amount finally to be credited upon the loss.

The cause of action did not arise until the settlement of the suit for damages against the railroad corporation. It was a joint

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venture. *Williams* v. *Henshaw*, 11 Pick. 79. *Fanning* v. *Chadwick*, 3 Pick. 420.

Decree affirmed.

W. H. Hastings, for the respondent.
L. A. Brown, for the petitioner.

AUGUSTA J. GLEASON *vs.* ELIZABETH DALY.

Plymouth. December 4, 1905. — February 28, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Witness, Cross-examination, Contradiction. *Will.*

At the trial of an issue as to the sanity of a testator who executed the alleged will in a ward of a hospital when three persons were present besides the attesting witnesses, one of these persons testified that when the instrument was presented to the alleged testator he was told "This is your will giving all your property to G." (the person to whom it was given by the alleged will) and was asked whether he wanted to sign it, and that the alleged testator nodded his head and reached for a pen. He also testified that on or about the day that the will was executed he saw the alleged testator take a teacup in his hand and drink from it, and that on various occasions he had asked the alleged testator how he was, and he had answered "Pretty well." On cross-examination he was asked whether he had not said to the orderly at the hospital on the day the will was executed "That it was a shame to make that man make a will. They might as well have a dead man." The judge excluded the question. On an exception to this ruling it was *held*, that, as the witness was not qualified to express an opinion upon the sanity of the alleged testator, the only question was whether an affirmative answer to the question was admissible to contradict the previous statements of the witness and thus weaken his credibility, and that the witness's alleged statement to the orderly properly might be interpreted as a statement concerning the mental capacity of the alleged testator, which the jury erroneously might regard as affirmative evidence on that issue, and so properly could be excluded by the judge as not strictly in contradiction of the statements of the witness as to simple physical acts of the alleged testator; *also*, that the judge properly might have excluded the evidence on the ground that the alleged statement was so vague and indefinite as not to have any tendency to contradict the witness.

APPEAL from a decree of the Probate Court for the county of Plymouth admitting to probate an instrument purporting to be the will of John Griffin.

At the trial of the appeal before *Lathrop*, J. the following issues were submitted to the jury:

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First. Was the instrument offered for probate as the last will of John Griffin, deceased, executed according to law?

Second. Was the said John Griffin of sound and disposing mind and memory at the time of the execution of the alleged will?

The jury answered both issues in the affirmative; and the appellant alleged exceptions, raising a single question as to the exclusion by the presiding justice of a question asked one Tileston upon his cross-examination as a witness, which is described fully in the opinion.

D. J. Sheerin, for the appellant.

R. W. Nutter, for the appellee, submitted a brief.

HAMMOND, J. One of the issues was whether at the time of the execution of the will the testator was of sound and disposing mind and memory; and on this issue the evidence was conflicting.

The will was executed in a ward of a hospital, and there were in the ward at the time three persons besides the subscribing witnesses. Tileston, one of these three, was called in support of the will. He testified among other things that when the will was presented to Griffin, the testator, he was told, "This is your will giving all your property to Gusty [the petitioner]," and was asked if he wanted to sign it; that Griffin nodded his head and reached for the pen. He further testified that he saw Griffin take a teacup in his hand and drink from it on or about the day the will was executed, and that on various occasions he had asked Griffin how he was and Griffin had answered "Pretty well." On cross-examination the witness was asked if he had not said to one Sullivan, the orderly at the hospital, on the same day the will was executed, "That it was a shame to make that man make a will. They might as well have a dead man." The question was objected to by the appellee as calling for the opinion of the witness on the testator's mental capacity; but the appellant stated that the question was asked with the intention of contradicting the witness, if he should answer in the negative, by calling Sullivan. The justice excluded the question, the appellant excepted, and the only matter for us to determine is whether there was error in law in excluding this question.

Since Tileston was not qualified to express an opinion upon

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the sanity of the testator, the only ground upon which the question was admissible, if at all, was that an answer in the affirmative would tend to contradict his previous statements and thus weaken his credibility.

Tileston had not expressed any opinion as to the sanity of the testator. He had simply testified to certain very simple physical acts of the testator. The statement which it is said he made to Sullivan, when fairly considered, is rather a statement respecting the mental capacity of the testator than his physical condition, and there was danger that it would be regarded by the jury as affirmative evidence of the testator's mental capacity. Under these circumstances the justice was justified in holding somewhat strictly to the rule as to contradictory evidence; and he may have concluded that the alleged statement was so vague and indefinite as not to have any tendency to contradict the witness. In coming to such a conclusion we do not see that he committed any error. The case differs from cases like *Hathaway* v. *Crocker*, 7 Met. 262, and *Brown* v. *Brown*, 108 Mass. 386, and should stand with *Hubbell* v. *Bissell*, 2 Allen, 196, and similar cases.

Exceptions overruled.

RAYMOND P. AHEARN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Plymouth. December 10, 1906. — February 28, 1907.

Present: KNOWLTON, C.J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence. Street Railway. Evidence, Of operation of mind, Of custom, Materiality. *Practice, Civil,* Exceptions.

In an action against a street railway company by a lineman employed by a telephone company for injuries caused by the plaintiff being struck by a car of the defendant as he was climbing a pole of his employer, if it appears that the pole was between two tracks of the defendant, that the plaintiff was equipped with "spurs, belt, pliers and cutters," and had in his hands the hand line attached to the wire which was to be strung upon the pole, that before he started to ascend the pole he saw a car approaching on one of the tracks about one hundred and fifty feet away, which appeared to be going at the rate of ten miles an hour, that he then was ordered by the "boss" in charge of the work to ascend the pole, and went up the side nearest to the track on which the car was approach-

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ing, with his back to the track, knowing that when he got upon the pole it would be impossible for him to look to see where the car was, that it was customary for the men on the ground to give warning of the approach of a car, and that the "boss" on the ground motioned for the car to stop, but the motorman disregarded the warning and ran by the pole which the plaintiff was climbing, causing the accident, there is evidence for the jury of due care on the part of the plaintiff, as the jury can find that the plaintiff relied and had a right to rely upon the "boss" to notify the car to stop and to give him notice of any impending peril while he was on the pole, and the fact that the warning was to have been given by a person not in the service or control of the defendant is immaterial upon the question of the plaintiff's due care; and also there is evidence of negligence of the defendant.

At the trial of an action by a lineman in the employ of a telephone company against a street railway company for injuries from being struck by a car of the defendant as he was climbing a pole of his employer between the tracks of the defendant, where it appears that the plaintiff was going up the side of the pole nearest to the track on which the car was approaching, if the plaintiff is asked why he went up that side of the pole, and answers that it "was the safe side to go," this must be interpreted to mean that the plaintiff thought at the time that it was the safe side, and is admissible as a reason for his action. Following *McCrohan* v. *Davison*, 187 Mass. 466.

At the trial of an action by a lineman in the employ of a telephone company against a street railway company for injuries from being struck by a car of the defendant as he was climbing a pole of his employer between two tracks of the defendant, where it appears that the plaintiff was going up the side of the pole nearest to the track on which the car was approaching, evidence that in stringing wires on poles near street railway tracks it was customary for men upon the ground to give notice to linemen of an approaching car, is admissible upon the issue of the plaintiff's due care.

At the trial of an action by a lineman in the employ of a telephone company against a street railway company for injuries from being struck by a car of the defendant as he was climbing a pole of his employer between two tracks of the defendant, where it appears that near the pole a sewer was being constructed and on each side of the trench were two red flags, there is no error in admitting evidence that these flags were used as danger signals, to warn people and "also the cars, particularly the cars," that a dangerous construction was going on there, this being admissible to show the condition of things at the time of the accident.

If in an action for personal injuries the defendant objects to the admission of certain evidence and it is admitted by the judge subject to the defendant's exception, and, after a charge by the judge to which the defendant takes no exception, the jury return a verdict for the plaintiff, in the argument by the defendant of his exception to the admission of the evidence, he cannot take the ground that the judge in his charge to the jury suggested an erroneous bearing of the evidence and enlarged its proper scope.

TORT against the Boston Elevated Railway Company for personal injuries from being struck by a car of the defendant on Blue Hill Avenue in Boston on September 25, 1905, while the plaintiff was in the employ of the New England Telephone and Telegraph Company and was working as a lineman on a

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pole of the last named company. Writ dated November 18, 1905.

At the trial in the Superior Court before *Bell*, J. the jury returned a verdict for the plaintiff in the sum of $1,033.33; and the defendant alleged exceptions to the refusal of the judge to rule that upon all the evidence the plaintiff was not entitled to recover and to the admission of certain evidence which is described in the opinion.

E. P. Saltonstall & S. H. E. Freund, for the defendant.

T. H. Buttimer, for the plaintiff.

HAMMOND, J. The plaintiff was an experienced lineman, and at the time he was struck by the car was in the employ of a telegraph company and was climbing one of its poles, which was situated between two tracks belonging to the defendant on Blue Hill Avenue. He was one of a gang of men consisting of "three climbers, including himself, two ground men, and the boss," who were engaged in putting wires on the poles. The process of doing this is thus described by the plaintiff: "The coils of wire . . . [are] . . . set on reels and . . . they [the men] hitch a running or hand line to these and take that running line and throw it over the pole and pull the wire through and stay on the pole till the wire gets by." There were two sets of the defendant's tracks, one the inbound track and one the outbound track; and the telegraph poles were substantially in the middle of the space between the two tracks. The pole upon which the plaintiff was at the time of the accident was not straight, but for several feet from the surface of the ground inclined toward the inbound track so that the distance between it and the extreme projection of the roof of a car passing on that track was only one foot and four inches, which is eight and a half inches less than it would have been if the pole had been straight.

As to the manner in which the accident occurred the plaintiff testified that McDonald the boss gave him a hand line and told him to ascend the pole; that just before this the hand line was on the track and, a car coming along, the plaintiff had to get it off the track; that after that car had passed McDonald gave him the order to ascend; that he (the plaintiff) took the hand line, glanced "down the street and did not see anything or any car that he thought would do any damage," and then walked

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across and started to climb the pole; that he had on "spurs, belt, pliers and cutters," and in his hands the hand line; that with the assistance of his spurs he reached the first step, which was nine or ten feet from the ground; that in going up the pole he used his hands "to balance some"; that he went up on the side nearest the inbound track, with his back to the track; that the other men were working upon the same side; that as he went up he was hit by the car; that at that time he had caught hold of the first step with one hand and of the second step, which was eighteen inches higher up, with the other; that when he was hit his left hand was knocked off, then the right, and he dropped to the ground in a faint.

The evidence showed that the day was clear, the road straight, and that there was nothing to obstruct the view for a half mile in the direction from which the car came. Upon cross-examination the plaintiff testified that before he started to ascend the pole he saw the car which afterwards struck him, coming towards him; that it then looked about one hundred and fifty feet away, and appeared to be going ten miles an hour; that before he started up the pole he did not notice that the pole slanted toward the track upon which the car was coming, although there was nothing to prevent him from seeing that fact. He further testified that after he had looked and seen this car one hundred and fifty feet away McDonald passed him the line, as before stated; that after he received the order to go up the pole and had stuck his spurs into it, he did not look to see where the car was although he knew that it might be much closer to him than when he first saw it; that before he started up the pole he realized that when he got on to the pole it would be impossible for him to look and see "where the car was at all"; that one can stand still on a pole and look out to one side, and that it is only when actually ascending a pole that one cannot look out at the side; that if he had stopped anywhere on the way up he could have looked either way, but he did not do it because it was not customary.

It further appeared that the part of the car with which he came in contact was the roof, and that in going up the pole one's buttocks and hips are thrown out "a little bit" at every step.

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It is urged by the defendant that the plaintiff was not in the exercise of due care inasmuch as the evidence shows that with full knowledge that a car was approaching he went up on the side of the pole nearest the track upon which the car was coming, and took no precaution whatever to protect himself from injury; and that therefore the case should stand with cases like *Quinn* v. *Boston Elevated Railway*, 188 Mass. 473. The answer of the plaintiff however is that he relied upon McDonald to warn him if the car should come dangerously near, and that he had a right thus to rely upon him. Upon this point the case is close. Upon an inspection of the evidence, however, we are satisfied that the jury were warranted in finding that in view of the various articles with which the plaintiff was incumbered at the time he was on the pole, the nature of the work he was expected to do, the close attention necessary to its proper execution, and the possibility of injury from passing cars, it was reasonably necessary for the protection of the lineman and for the proper dispatch of the business that some one should be on the ground to notify the lineman of approaching danger; and further, that in this case the plaintiff did rely and had the right to rely upon McDonald to notify the car to stop and to give him notice of any impending peril while he was on the pole. Upon such findings the case is clearly distinguishable from cases like *Quinn* v. *Boston Elevated Railway*, *ubi supra*, and more closely resembles *Davis* v. *New York, New Haven, & Hartford Railroad*, 159 Mass. 532, and similar cases. And it is immaterial upon the question of the due care of the plaintiff whether this warning was to be given by some party other than the defendant and its servants. The question of the due care of the plaintiff was properly submitted to the jury.

There also was evidence of the negligence of the defendant.*

* There was evidence produced by the plaintiff that it was customary for the men on the ground to give warning in the case of the approach of cars, and that on this occasion the foreman on the ground motioned for the car to stop, but the motorman disregarded the warning, and, without abating the speed of the car, ran by the pole which the plaintiff was climbing. There also was evidence that near the pole a sewer was being constructed, and on each side of the trench were two red flags used as danger signals, to warn people and "also the cars, particularly the cars" "that there was a dangerous construction going on."

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We pass to the questions arising upon the admissibility of evidence. The answer of the plaintiff when asked why he went up on the side of the pole "on which . . . [he] . . . did," that it "was the safe side to go," must be understood not as a statement by the witness that it was the safe side, but that he thought at the time that it was, and hence as a reason for his action it was admissible. *Whitman* v. *Boston Elevated Railway*, 181 Mass. 138. *McCrohan* v. *Davison*, 187 Mass. 466.

The evidence as to the custom of giving notice to linemen by men upon the ground was rightly admitted. It bore upon the question of the plaintiff's due care, and on that point it is immaterial that the action was against some other party than the employer of the plaintiff.

The evidence that the flags were stationed to notify the people that there was danger, "also the cars, particularly the cars," or "that there was a dangerous construction going on" there, was admissible to show the condition of things. If, as is now contended by the defendant, the judge in his charge to the jury suggested an erroneous bearing of the evidence and enlarged its proper scope, the answer is that no exception was taken to the charge.

Exceptions overruled.

MICHAEL DUSOPOLE *vs.* JOHN N. MANOS.

Middlesex. December 12, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Conduct of trial, Judge's charge. *Infant. Partnership.*

It is no ground of exception to the charge of a presiding judge that he suggested in his charge to the jury a possible view of the evidence which had not been contended for by either of the parties and up to that time had not been mentioned in the case, if the possible conclusion of fact suggested by the judge is warranted by the evidence.

If an infant, under an agreement by which he is to enter a partnership with two other persons when he has contributed a certain amount of money, deposits with one of these persons a sum of money less than the amount required, to be held by this person as a depositary until the full amount is paid, and if the infant never pays the full amount, the contract is executory and the infant may avoid it and recover the money he has deposited.

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CONTRACT, upon an account annexed, for money lent by the plaintiff to the defendant and for work and labor performed by the plaintiff for the defendant. Writ in the Police Court of Lowell dated August 30, 1905.

On appeal to the Superior Court the case was tried before *Hardy*, J. The plaintiff testified that he was a native of Macedonia in Turkey; that he and the defendant had been acquainted with each other for many years in the old country; that he came to this country about four years ago from Turkey and came to Lowell, where the defendant, who had preceded him to this country by about two years, then resided; that he worked in a mill in Lowell about six months, and at the end of that time went to work in a shoe shop in Nashua, New Hampshire; that the defendant's brother, Elias Manos, was employed in the same shop in Nashua; that in September, 1903, the defendant came to Nashua and informed him that he had purchased a store in Lowell, and asked him to let him have some money; that the plaintiff afterwards went to Lowell with the defendant's brother and gave the defendant $150; that at different times he let the defendant have other sums of money in the same manner until the amount aggregated the sum of $385; that in the meantime he continued to work in the shop in Nashua; that about the last of March or the first of April he became too ill to continue his work in Nashua and left the shop and came to Lowell; that the defendant hired a room for him, where he slept, and that he spent most of his time in the fruit store of the defendant; that at the end of two weeks from the time of his coming to Lowell the defendant asked him to go to work in the store; that he did so; that his work consisted in making and selling ice cream and sometimes attending the store with the defendant and his brother, who also worked there; that he continued so to work until the latter part of July of 1904, when he again was taken ill, and, being informed by his physician that the climate did not agree with him, determined to return to his home in Turkey; that he asked the defendant for his money and the defendant informed him that he could not let him have it at that time, but that the defendant paid him $150, and paid a further sum for him of $29, and further promised to pay his debts and to send him the balance of the money; that the defendant never sent him any money; that he returned

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from Turkey to this country in the summer of 1905, and went to the defendant and asked for his money; that the defendant said he could not pay him then but that he would do so when he sold his store.

On cross-examination he testified that it was the defendant's brother Elias who spoke to him in Nashua about the money, and told him that the defendant had bought a store in Lowell, and wanted money; that at the same time he asked the plaintiff whether he would not like to be a partner; that he replied that he did not want to be a partner, but would help him with money; that thereupon he collected some money that was due him and came with the defendant's brother to Lowell with the money and delivered it to the defendant; that there was no note or receipt given for the money and no time of repayment specified, and no agreement as to interest or other compensation for the use of the money; that he was now about twenty years and six months of age. On cross-examination he admitted that at the trial of this case in the Police Court of Lowell he testified that he was twenty-one years of age, but said that since that time he had by correspondence obtained a certificate which convinced him that his statement in the Police Court was incorrect. The certificate was produced by the witness and was shown to the counsel, but was not offered in evidence by either party.

The plaintiff offered the evidence of several other witnesses, all of whom testified to certain conversations with the defendant after the plaintiff returned from Turkey, tending to show that the defendant admitted that he was indebted to the plaintiff and made excuses for non-payment of such indebtedness.

The defendant testified and offered evidence tending to show that the money paid to him by the plaintiff was for a share in a partnership consisting of the plaintiff, the defendant and the defendant's brother.

At the close of the evidence the defendant asked the judge to rule and instruct the jury as follows: "If you find that the money contributed and paid by the plaintiff was not a loan, but was paid to purchase an interest in the business as a partner, and that the services performed in the store were rendered as a partner, and part owner, and without any agreement with the other partners to pay a salary or wages, your verdict must be for the defendant."

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The judge gave in substance the instruction requested, but also gave other instructions including the portion of the charge which is quoted in the opinion. The jury returned a verdict for the plaintiff in the sum of $361.92; and the defendant alleged exceptions to this portion of the charge.

F. W. Qua, *S. E. Qua* & *A. O. Hamel*, for the defendant.

D. J. Murphy, for the plaintiff.

HAMMOND, J. One of the questions was whether the money was lent to the defendant, or was paid to him for a share in a partnership which was to consist of the plaintiff, the defendant and the latter's brother. As to the partnership phase of the case, the judge instructed the jury in substance that if the plaintiff advanced the money for the purpose of becoming a partner and he became a full partner or became entitled to the rights of a partner in a share of the profits as repayment of the sum advanced, he could not recover although he was a minor. The judge still further instructed the jury as follows: "Now it is for you to say from all that evidence whether between the time that he began to pay this amount of capital, as it is claimed here by the defendant, and the time when he made his last payment, in all amounting to three hundred and eighty-six dollars, whether it was intended and was agreed at that time that he was to become a full partner. Did he become a partner, or was this money simply advanced to the defendant in this case as a depositary until the full amount was paid, which was four hundred thirty-three dollars and thirty-three cents and one-third? Was the service rendered in connection with the fact that he was working for the defendant as an individual? If you find that he was not a partner at that time, that this money was merely advanced as a part payment of the full amount of four hundred and thirty-three dollars and this defendant simply had control of that fund for the purpose of going into partnership, with that in view, this plaintiff, if he were a minor, would have a right to revoke that contract which would be executory, and until its full completion he would have a right to revoke the contract and recover what he had paid up to that time."

The defendant does not contest the correctness of the rules of law thus enumerated, but he contends that there is no evidence which would warrant a finding that the money was paid to the

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defendant as a depositary in the manner stated in this part of the charge; that neither the plaintiff nor the defendant either in the testimony or in the arguments made any claim that it was; and hence that it was error to submit the case in this way to the jury.

We have examined the testimony, however, and think that the view of the case suggested by the judge is warranted by the evidence; and that in view of all the circumstances the jury properly could find that the plaintiff never became a full partner and never was recognized as such, but that his membership of the firm depended upon his first paying in his full share of the capital, and that until that was done the defendant was a mere depositary of the money. It is immaterial that this possible view of the evidence had not been presented by the parties, and had not been suggested before the charge.

Exceptions overruled.

JAMES M. GRIFFIN *vs.* A. D. CURRAN & another.

Suffolk. December 12, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability.

If a coal trimmer while going down a ladder in the hatchway of a vessel is injured by a barrow of coal being dumped upon him through the negligence of a fellow workman, who has been selected by the superintendent in charge to see that each man is safely down before any coal is dumped into the hatch, he cannot recover from their common employer.

At the trial of an action by a coal trimmer against his employer, a stevedore engaged in loading a certain vessel with coal, for injuries from a barrow of coal being dumped upon him as he was going down a ladder in the fore hatchway of the vessel, it appeared that the plaintiff was one of a gang of twenty or twenty-two men employed by the defendant under the charge of a superintendent, and that the vessel was being loaded at both the forward and the after hatch which were about forty feet apart. The plaintiff contended that the superintendent ordered the wheelman who dumped the coal on him to dump it when he did. The plaintiff testified that before he started to go down the ladder from the hurricane deck this wheelman spoke to him and that at that time the superintendent was near the after hatch where he could see and be seen by this wheelman but that the plaintiff "was not in plain sight" of him. The wheelman testified that before he emptied the barrow one of the boys (not the superintendent for he knew the superintendent's voice and the voice was not

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his) called out "Come on with the coal." The plaintiff called another wheelman, who was at the after hatch, a trimmer who was waiting to follow the plaintiff down the ladder of the fore hatch, another workman at the fore hatch and still another who was at the after hatch, and each of them testified that he did not give this order. No witness testified that the superintendent gave it. The plaintiff did not call all the men who appeared by the evidence to have been on the hurricane deck at the time. *Held*, that, assuming that the words were an order and that the order was given to the wheelman at the fore hatch and not to the wheelman at the after hatch, the evidence did not warrant a finding that the superintendent gave it.

LORING, J. This case comes up on an exception to a ruling directing a verdict for the defendant on the plaintiff's evidence.

The action was brought by a coal trimmer for injuries received from a barrow of coal being dumped on him as he was going down a ladder in the fore hatch of the Admiral Farragut on October 13, 1903. The defendants, in whose employ the plaintiff then was, were engaged in loading the Farragut with coal. The ground on which the plaintiff seeks to charge the defendants is negligence of a superintendent within the employers' liability act.

The coal was in a lighter alongside the Farragut, and was hoisted up from the lighter in a tub which was emptied into a barrow on a run. The run in question was some thirty feet long, with one end over the lighter and the other end over the Farragut's fore hatch. It is the duty of the wheelman to empty the coal into the barrow, and when the barrow is full, to run the barrow to the end of the run close to the dump stick, knock the catch and dump the coal.

The plaintiff was in a gang of twenty or twenty-two men, with one Wren in charge, who was or might be found to be a superintendent. The Farragut was being loaded in the way just described, at both a forward and an after hatch. There was a wheelman on the stage or run of each hatch and eight trimmers for each hatch, four for each side of the ship.

The men knocked off work for half an hour at half past three o'clock in the afternoon to get something to eat. The plaintiff stayed on the ship and ate his meal by the after hatch on the main deck. There were three decks, the lower deck, the main deck and the hurricane or upper deck. When the half hour's rest came to an end Wren gave the word for the men to go to work. The plaintiff went up a stairway to the hurricane deck, then past

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the after hatch over the hurricane deck to the fore hatch, a distance of some forty feet, passed under the run or staging which is some two to four feet above the coaming of the hatch, and started down the ladder on the port side of that hatch. This ladder had eleven rungs about a foot apart. He testified that before he got to the bottom the barrow of coal in question was dumped on him.

As the plaintiff went up the stairway from the main deck near the after hatch, he passed Wren, who was "right at the stairway." As he passed under the run or staging of the fore hatch he saw and spoke to Crowder, the wheelman on that run. He testified that Crowder asked him what side of the ship he was working on and told him to hurry and get down. Crowder's testimony is different, but the difference is not material. The plaintiff testified that at this time Wren was near the after hatch, where he could see and be seen by Crowder, but that he, the plaintiff, "was not in plain sight" of him, Wren.

The plaintiff undertook to prove a certain custom by which Wren looked out to see that each man was safely down before any coal was dumped into the hatches. On cross-examination he testified that Wren did this personally or selected some one else to do it; on being pressed further he testified that "many times he selected the wheeler." The overwhelming weight of the evidence was that there was no such custom, but it cannot be said that there was no evidence of such a custom. If there was, it is plain that in those cases where the time to begin dumping coal was left to the wheeler or other employee it was left to a fellow servant, and for the negligence of a fellow servant the defendant is not liable.

The plaintiff knew that the time for beginning to dump coal was left by Wren in the case at bar to Crowder, the wheeler. Wren was thirty or forty feet away at the time, and appeared to be otherwise engaged. The plaintiff testified that he "stood at the after hatch with a book in his left hand and a pencil in his right"; that he knew that Wren had told Crowder the wheeler not to dump coal on men going down a hatch, and that he relied on Crowder's obeying those orders.

In addition the plaintiff undertook to go to the jury on the ground that Wren ordered Crowder to begin dumping coal on

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the occasion in question. Crowder testified that one of the boys (not Wren, for he knew Wren's voice and the voice was not Wren's voice) called out "Come on with the coal," before he emptied the barrow in question. The plaintiff called one Harold, who was the wheelman on the after stage, one Eastman, who was waiting to follow the plaintiff down the ladder, one Surree, who was at the fore hatch, and one Thomas, who was at the after hatch. Each testified that he did not give this order. No witness testified that Wren gave it. The plaintiff did not call all the men who appeared from the evidence to be on the hurricane deck at the time. This evidence did not warrant the jury in finding that it was Wren who gave the order, if it was an order, and if it was given to Crowder on the fore hatch and not to Harold at the after hatch.

Exceptions overruled.

J. E. Young, for the plaintiff.

C. S. Knowles, for the defendants.

JOHN McMANUS *vs.* SAMUEL B. THING & others.

Suffolk. December 13, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence. Elevator. Landlord and Tenant.

If the lessee of a building containing a freight elevator sublets portions of the building, with the agreement and understanding that the subtenants and their employees as well as the lessee and his employees may use the elevator but that when any one of the occupants of the building is using the elevator he shall have the exclusive use of it until his use is completed, and if, while a servant of one of the subtenants is using the elevator and has not completed such use, a servant of the lessee at his own request is permitted by the servant of the subtenant to come upon the elevator with a truck holding a large crate, whereupon the servant of the subtenant starts the elevator and the servant of the lessee is injured, in an action by the person injured against the master of the servant who started the elevator, the plaintiff is in the position of a mere licensee and cannot recover unless he shows that the servant of the defendant injured him wilfully or acted with such reckless wantonness as to amount to a wilful wrong.

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TORT for personal injuries alleged to have been caused by the negligence of one Redding, a servant of the defendants, in starting a freight elevator without notice to the plaintiff who was upon it, whereby the plaintiff's foot was caught and crushed. Writ dated July 15, 1903.

In the Superior Court the case was tried before *Aiken*, C. J. The accident occurred in the middle of the afternoon of April 11, 1903, on the freight elevator in the building at the corner of Congress Street and High Street in Boston. The building was leased to the George E. Gilchrist Company, a dealer in plumbers' supplies, which occupied the first and second floors and also some other floors of the building, and sublet some of the upper floors to other concerns. The plaintiff was in the employ of the Gilchrist Company. The defendants were copartners engaged in the wholesale and retail shoe business, and occupied the fifth floor or loft of the building as subtenants at will of the Gilchrist Company. They had an agreement with the Gilchrist Company by which they and their employees were to use this freight elevator in common with other tenants in the building. The defendants used the loft in question as a storage loft, the main office of the firm being in another building on Congress Street.

One Baxter was called by the plaintiff, and testified that at the time of the accident he was a clerk in the employ of the Gilchrist Company. "As to the rights of the various occupants of the building to the use of the elevator he said that when the employees of one tenant were using the elevator they had the right to the exclusive use thereof until they were through, and that if the employees of any other tenant rode thereon it was by the courtesy of the party using it."

One Pentleton, also called by the plaintiff, who was another clerk employed by the Gilchrist Company, testified that "when one of the tenants of the building or his employees were using the elevator the one using it had the exclusive use thereof until he was through with it."

The plaintiff testified that just before the accident the elevator was stationary, on a level with Congress Street, and the Congress Street door was open; that he desired to take up to one of the upper floors of the building two large crates about five and

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one half feet by three and one half feet and weighing about seven hundred pounds each, which were on the sidewalk and belonged to the Gilchrist Company; that he got a two wheeled hand truck, loaded one of the crates upon it and wheeled it across the sidewalk of Congress Street, walking backward and dragging the truck after him; that proceeding in this way he entered the elevator which was entirely empty and had no one on it, Redding being at the time on the sidewalk.

He then described the accident as follows: "So I pulled the crate after me right on to the elevator, and I had another one to put on, so I had to pull it back as far as I could, this way, and I was in the act of ending-up the crate — it took all my strength; it probably weighed seven hundred pounds — and this heel (his right) stuck out a little over the floor of the elevator, and this man, Mr. Redding, come on to the elevator and started the cable and caught my foot between the elevator and the other floor."

On cross-examination he said that Redding walked into the elevator from Congress Street, and standing by the cable facing inward, pulled the rope and started the elevator; that according to his understanding Redding had as much right on the elevator as he did, but that Redding had no right to operate the elevator at that time while the plaintiff had possession of it.

Redding was called as a witness by the defendants, and, as to what occurred at the time of the accident, said that he had prepared for shipment a number of cases of rubbers; that he had loaded them on the elevator from the floor occupied by his employers, and had taken them down to the street; that he there unloaded them, aided by one Bagley, a teamster's helper, who took the cases from the witness at the elevator door and carried them across the sidewalk to pile them either on a wagon or at the edge of the sidewalk; that the cases which they were handling varied in size, the largest being two or three or three and one half feet in length by eighteen inches or two feet across, the smallest being about ten inches by eight inches.

He then testified as follows: "I got them all off with the exception of about three cases that were so badly broken I concluded I would take them upstairs, and I placed them on one side of the elevator; they were rather small cases; I placed them on one side of the elevator. . . . Well, I started — after I had

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discharged my load with the exception of them three cases I started to return. I pulled the elevator down — that is, the rope down — to start it up, and the elevator had risen perhaps a matter of an inch or two when Mr. McManus jumped upon it as it was moving. He says, 'Wait, stop,' which I did. He then requested me to return to the street. I remonstrated with him, telling him I was very busy and I couldn't very well take the time necessary to return to the street. — He said — he says, 'I wish — I want to take this crate up.' I then at his request returned — shifted the elevator back — it had risen up perhaps a matter of three or four inches — back to a level with the sidewalk, and I stood there, with my right hand upon the rope, facing the street, and I watched him as he came into the elevator with this crate on the truck."

The witness then said that after he had brought the elevator back to the Congress Street level McManus stepped up into the first floor store, occupied by the Gilchrist Company, and there got a hand truck; that he came back across the elevator with the truck and went out to the Congress Street sidewalk. "He put the crate on the truck and backed back of it with his two hands holding each handle, with the truck; backed back of it as far on to the elevator as he could conveniently go. He paused for a moment when he got there. I spoke to him; I says, 'All right?' and he says, 'Yes.' And I pulled the rope to go up. The next I heard, he cried out, 'Stop, I am caught,' and I stopped the elevator as quickly as possible. I turned at about the same time and I see that his feet — both feet — were caught underneath the studding — a piece of studding or joisting that runs underneath the floor and — between this joisting and the lip of the elevator or the flooring of the elevator."

At the close of the evidence the defendants asked for certain rulings among which were the following:

Ninth. If the plaintiff was a trespasser or a bare licensee, the defendants and their agents and servants owed him no duty except to refrain from wantonly, wilfully or recklessly exposing him to injury.

Tenth. If the plaintiff was a trespasser or a bare licensee, he cannot recover in this action and the verdict must be for the defendants.

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Eleventh. There is no evidence in the case which would warrant the jury in finding that Redding wilfully or recklessly or wantonly caused the injury alleged to have been sustained by the plaintiff, and if the jury shall find that the plaintiff was upon the elevator as a trespasser or as a bare licensee, he cannot recover and the verdict must be for the defendants.

Twelfth. If the jury shall find that the plaintiff was upon the elevator as a trespasser or as a bare licensee, he cannot recover unless the jury shall find that the injury to the plaintiff was caused by the wanton and reckless conduct of the defendant's servant done while acting within the course of his employment.

Thirteenth. The defendants and their servants and agents did not owe the plaintiff any duty to warn him that the elevator was about to start.

The Chief Justice refused to make any of these rulings, and submitted the case to the jury with other instructions, the substance of which is stated in the opinion. The jury returned a verdict for the plaintiff in the sum of $1,450; and the defendants alleged exceptions.

R. E. Goodwin, (*E. E. Blodgett* with him,) for the defendants.

C. Reno, for the plaintiff.

Loring, J. The plaintiff testified that under the arrangement then in force as to the use of the elevator by the different occupants of the building, he (the plaintiff) had no right on it, to it, or to the use of it if it was being used by Redding; and, further (in effect) that if the defendants' broken boxes were on the elevator to be taken back and Redding had not left the elevator after he brought them down, the elevator was being used by Redding within the arrangement testified to by him. There does not seem to have been any evidence to the contrary.

It is plain therefore that if the jury believed Redding's story the plaintiff was a trespasser or at most a licensee at the time of the accident. *Albert* v. *Boston Elevated Railway*, 185 Mass. 210. *Shea* v. *Gurney*, 163 Mass. 184. It is immaterial which. For if either a trespasser or a licensee the defendants were not liable unless their servant Redding injured the plaintiff wilfully or acted with such reckless wantonness as to amount to a wilful

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wrong and thereby caused the injury. *Banks* v. *Braman*, 188 Mass. 367.* *Bjornquist* v. *Boston & Albany Railroad*, 185 Mass. 130. *Albert* v. *Boston Elevated Railway*, 185 Mass. 210. *Shea* v. *Gurney*, 163 Mass. 184.

For these reasons the ninth, tenth, eleventh, twelfth and thirteenth rulings asked for, or the substance of them, should have been given.

In place of doing so the presiding judge told the jury that they should find for the plaintiff if they found that Redding (in the course of the defendants' employ) was guilty of ordinary negligence and the injury to the plaintiff was caused thereby.

Exceptions sustained.

ANTHONY W. REDDY *vs.* FRED O. RAYMOND.

Essex. January 3, 1906. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Assignment. Attachment.

If an assignment for the benefit of creditors is executed by the assignee, who also is one of the creditors, the signature of the assignee operates as an acceptance of the provisions of the instrument by him as a creditor, and his title as assignee, at least to the extent of his claim, becomes good against a subsequent attachment of property of the assignor by another creditor, although no creditor except the assignee has executed the assignment.

REPLEVIN, by the assignee under an assignment in writing under seal for the benefit of creditors made by Sidney T. Collis as assignor, for a stock of groceries, which the defendant, who was a deputy sheriff, had attached as the property of Collis. Writ in the Second District Court of Essex dated June 20, 1904.

On appeal to the Superior Court the case was submitted to *DeCourcy*, J. upon an agreed statement of facts. The judge found for the plaintiff, and assessed damages in the sum of $1 and costs in accordance with a stipulation in the agreed statement of facts. The defendant appealed.

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* See note at foot of page 162 of 192 Mass.

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The agreed facts were as follows:

On June 8, 1904, Sidney T. Collis, who had been carrying on a grocery business at Amesbury, made an assignment for the benefit of his creditors to the plaintiff, an attorney at law.

The assignment was an instrument in writing executed under seal by Collis as assignor and by the plaintiff as assignee. It was an ordinary common law assignment for the benefit of creditors, and purported to be made by and between Collis, party of the first part, Reddy, party of the second part, "and the creditors of said party of the first part, who shall assent in writing to the terms of this agreement, as hereinafter provided, parties of the third part." It was recorded on June 9, 1904.

The indebtedness of Collis was $1,200, which he owed to twenty-nine creditors, and his assets, consisting of the stock in trade described in the instrument of assignment, were valued at $350. On June 9, 1904, after the plaintiff had taken possession of the property described in the deed of assignment, the defendant, a deputy sheriff, made an attachment on the above mentioned property, on a capias writ in due form, in which Edwin H. Moulton, a creditor of Collis to the amount of $500, was named as plaintiff and Collis was named as defendant.

Before the attachment was made, the plaintiff informed the defendant that he was holding the goods as assignee. Before the attachment by the defendant, no creditor had assented in writing to the assignment, unless the assent of Reddy, who was a creditor, might be presumed from his signing the instrument. Reddy was a creditor of Collis to the amount of $25 before the execution of the mortgage hereinafter mentioned. On June 20, 1904, after the defendant had taken possession of the goods by virtue of his writ, the plaintiff brought the writ in the present action and replevied the goods. On June 8, 1904, before the execution of the instrument of assignment, Collis executed to Reddy a mortgage for $250 on the above mentioned goods, to secure a note of the same date and amount for services rendered and to be rendered in connection with the assignment. On September 24, 1904, the plaintiff made a demand in writing upon the defendant for $125, alleged to be due on the mortgage. No payment was made on this demand.

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It was agreed that the court might draw inferences from the statement of facts. If upon the facts stated the plaintiff was entitled to recover either as assignee, or as mortgagee by virtue of the demand made on September 24, 1904, judgment was to be entered in his favor for the sum of $1 damages and costs of suit; otherwise, judgment was to be entered for the defendant for the return of the goods, $1 damages and costs of suit.

The case was submitted on briefs.

J. J. Ryan & G. I. Davis, for the defendant.

A. W. Reddy, pro se.

MORTON, J. The plaintiff, besides being the assignee named in the deed of assignment, was a creditor of the assignor, and his signature to the deed operated not only to create the relation of assignor and assignee between the debtor and himself, but also constituted an acceptance by him as a creditor of the provisions of the deed in accordance with the terms thereof. *Hastings* v. *Baldwin*, 17 Mass. 552. By his signature the deed of assignment became valid and effectual to the extent at least of the plaintiff's claim as a creditor, and the plaintiff having taken possession under it of the property before the attachment had a title to the goods superior to that of any creditor seeking to attach them *in specie*. The interest of the debtor in the goods could have been reached by the trustee process, but the title to the goods themselves having vested in the assignee they were no longer attachable by a creditor of the debtor as the goods of the latter. *Fall River Iron Works* v. *Croade*, 15 Pick. 11.

The assignment purported to be for the benefit of creditors, not in fraud of them, and the general finding in the plaintiff's favor concludes the question as one of fact. It is true that the assignment could have been avoided by proceedings in bankruptcy seasonably begun or by attaching creditors before it had been fully executed; not however because it was necessarily in fraud of creditors, but in the former case because it is the policy of the law to take the distribution of bankrupt estates into its own hands, and in the latter case because until executed by one or more creditors the deed was ineffectual and the property remained the property of the debtor and was attachable as such.

This view of the effect of the assignment renders it unneces-

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sary to consider whether the attachment was dissolved by reason of the failure of the attaching creditor to comply with the demand made for the payment of the mortgage.

Judgment affirmed.

JAMES G. MORRISON *vs.* EDWARD M. RICHARDSON.

EDWARD M. RICHARDSON *vs.* JAMES G. MORRISON.

Middlesex. January 7, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Damages, Liquidated. *Practice, Civil*, Auditor's report, Conduct of trial, Judge's charge, New trial. *Evidence*, Presumptions and burden of proof.

A landowner, who was constructing a building on his land for the purpose of letting stores and tenements, after a contractor who had agreed to finish the building by August 1 had failed, undertook to finish the building himself. When the building was ready for the doors, he made a contract with a manufacturer for certain numbers of doors, windows, sashes and blinds, to be finished within certain numbers of days named varying from one to twenty. At the time of making the contract, which was dated August 26, the landowner informed the manufacturer that he was in a great hurry to receive the doors in order that they might be put in at once as they were received and that it was important for purposes of letting that the whole building should be ready for the fall season. Thereafter there was inserted in the contract the following clause: "In case of any failure on his part to perform this agreement within the time specified according to the tenor thereof said R. agrees to pay said M. the sum of $10 per day until he shall have fully performed said agreement, as damages." The contract called for eighty cypress doors to be delivered in eight days. The cypress doors were to be used in the tenements. Twenty-eight of these doors were furnished by the manufacturer and were used to finish one tenement which was let to a tenant early in October. In some of the other tenements tenants moved in paying less than the full rent until the doors were finished. In an action by the landowner against the manufacturer for a breach of the contract, it was *held*, that the provision of the contract above quoted must be interpreted in view of the circumstances under which it was adopted and as relating to a substantial and not to a trifling or unimportant breach of the contract, and so interpreted it should be enforced as an agreement for liquidated damages; *also*, that the fact that the plaintiff let a part of the premises and used a part of the doors did not affect his right to recover the stipulated damages, as the provision that in case of failure of performance within the time specified the defendant should pay the sum of $10 per day "until he shall have fully performed said agreement" covered a partial breach as well as an entire one.

In the trial of an action of contract before a jury where there *is* an auditor's report in which he finds for the plaintiff, and there also is oral evidence, the auditor's

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report, although it is *prima facie* evidence, does not affect the burden of proof, which always remains on the plaintiff to satisfy the jury by a preponderance of the evidence, upon a consideration of the auditor's report and all that is contained in it together with the other evidence, that he is entitled to damages.

Where a presiding judge in his charge to the jury has made use of expressions which taken by themselves are objectionable, but at the close of the charge, on his attention being drawn to the matter by counsel, in the presence and hearing of the jury, assents to a correct statement of the law and adopts it, there is no ground for exception.

Where in an action of contract the plaintiff obtains a verdict but excepts to the rulings of the presiding judge as to the assessment of damages, and his exceptions are sustained, he may retain the advantage of his verdict on the question of liability, and the new trial granted to him will be confined to the question of damages.

CROSS ACTIONS OF CONTRACT upon an agreement in writing as described in the opinion. Both writs dated January 8, 1896.

The contract sued upon was as follows:

"$450.

"This agreement made this 26th day of August, A. D. 1895, between E. M. Richardson, of Waltham, and James G. Morrison, of Somerville, all in the County of Middlesex and Commonwealth of Massachusetts..

"Witnesseth that said Richardson agrees to furnish the following material for the sum of $450.00 to James G. Morrison, for his building corner Pearl and Walnut streets, in said Somerville, all to be of the best of its respective kinds or to be made so promptly at said Richardson's expense, and all to be subject to the approval of J. F. Cobb, Architect. All to be according to plans and specifications for the building, namely: all doors, windows, sash and blinds necessary to complete the said building as per schedules of even date signed by the said J. F. Cobb, Architect; the same to be furnished within the following time:

4 Pine Doors	within	2 days	
5 Oak "	"	1 "	(including store doors)
80 Cypress "	"	8 "	
4 set & 3 prs. Blinds	within	3 "	
10 Windows and 22 Sash	"	4 "	(including store sash)

Balance of schedule of Doors within 20 days. Of windows, sash and blinds within 10 days from date.

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"In case of any failure on his part to perform this agreement within the time specified according to the tenor thereof said Richardson agrees to pay said Morrison the sum of Ten Dollars per day until he shall have fully performed said agreement, as damages. And in consideration of the performance of said agreement on the part of said Richardson, said Morrison agrees to pay said Richardson the sum of $450.00 within 1 days from the last delivery.

"E. M. Richardson
James G. Morrison

"Witness, John T. Foster."

In the Superior Court the cases were tried together before *Bond*, J. Both cases had been referred to an auditor, who made two original reports and a supplemental report, all of which were introduced in evidence at the trial.

It appeared in evidence that the building referred to in the contract contained on one side three stores on the ground floor with two tenements over them, and on the other side three tenements; that the oak doors called for in the contract were to be used for outer doors and for the stores; that these oak doors were furnished within the time specified in the contract; that two of the stores were let early in October, and the third the first of November; that the cypress doors were to be used in the tenements; that the cypress doors furnished by Richardson and used by Morrison were twenty-eight in number and were used to finish up one tenement, which was let to a tenant early in October, who paid his rent from that time; that in some of the other tenements tenants moved in before the doors were furnished; that one of these other tenants paid about half the rent for the period before the doors were furnished. There was evidence tending to show that Morrison originally made a contract with a contractor for the construction of the entire building by which the contractor agreed to finish the building by August 1, 1895; that owing to the failure of the contractor the contract was terminated and Morrison undertook to finish the building himself; that for this purpose he employed an architect and carpenters to do the work by the day, and that at the time of the contract with Richardson they were working on the building and the building was ready for the doors, and Morrison was in a

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great hurry to receive the doors in order that they might be put in at once as they were received; that it was important for purposes of letting that the whole building should be ready for the fall season; that Morrison called Richardson's attention to all these facts and that thereafter the clause in the contract with reference to $10 a day was inserted and the contract was signed. Richardson introduced evidence to the contrary.

The judge submitted the following questions to the jury:

1. Did Morrison use some of the cypress doors at the request of Richardson or his attorney and upon the promise of Richardson or his attorney that Richardson would furnish proper doors in place of those which were not in accordance with the contract?

2. Did Morrison delay ordering the sixty doors to replace those claimed to be not in accordance with the contract until December 14, 1895, at the request of Richardson or his attorney for the purpose of allowing Richardson or his attorney to furnish other doors in place of those which Morrison refused to accept?

The jury answered both of these questions in the affirmative.

Morrison introduced evidence tending to support the affirmative answer to each of these questions and Richardson introduced evidence to the contrary.

Morrison asked the judge to rule as follows:

1. The sum of $10 per day specified in the contract is to be treated as liquidated damages and not as a penalty.

2. The fact that the plaintiff accepted and used some of the articles specified in the contract and obtained the rent from a part of his building does not necessarily limit his right to recover thereafter the sum of $10 per day from the defendant so long as the defendant remained in default as to a substantial and important part of the contract.

3. If the defendant was in default as to a substantial and important part of the contract the plaintiff is not prevented from recovering the sum of $10 per day so long as that default continued by the fact that the plaintiff could have procured the goods to be manufactured by others provided that his failure to do so was due to the defendant's request or to the plaintiff's reliance upon the defendant performing his contract and furnishing

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doors in conformity with its provisions and provided that such reliance was reasonably justified by the defendant's conduct.

The judge refused to make any of these rulings and Morrison excepted.

At Richardson's request the judge instructed the jury that upon the facts found by the auditor and upon all the evidence in the case Morrison could not recover as liquidated damages the sum of $10 per day specified in the contract but only the actual damage which he sustained and the jury was directed to assess such actual damage. To this ruling Morrison excepted.

In *Richardson* v. *Morrison* the jury found for the defendant. In *Morrison* v. *Richardson* they found for the plaintiff and assessed the damages at $586.42. Both parties alleged exceptions.

The exceptions of Richardson to the refusal of the judge to make certain rulings requested by him in regard to the assessment of damages have been made immaterial by the decision of the court.

The colloquy which took place at the close of the charge between the counsel for Richardson and the presiding judge in regard to the effect of the auditor's report, which is referred to in the opinion, was as follows:

"Mr. Mayberry. — Then, if your honor pleases, I also desire to save an exception to your honor's instructing the jury that they are to take the auditor's report unless the other evidence satisfies them that it is wrong, and to ask your honor to rule in place of that that they may take the auditor's report as *prima facie* evidence, and consider all that is contained in the auditor's report, as well as the rest of the evidence, and use their own judgment and experience —

"The judge. — Have n't I told them that, in substance?

"Mr. Mayberry. — No, your honor, I understood your honor to say that they must follow the auditor's report unless the other evidence in the case satisfies them that it is wrong.

"The judge. — I did tell them that, that they could take the auditor's report, which was evidence in the case, and which was *prima facie* evidence in the case, and take all the other evidence that was in the case, and then say what their conclusion was. If they were satisfied that the auditor's report was right, then they would take that.

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"Mr. Mayberry. — But, if upon the whole evidence, with the burden of proof upon the plaintiff, if upon the whole evidence, the auditor's report and all the facts contained in it and all the other evidence, the plaintiff in the Morrison-Richardson case fails to satisfy them by a fair preponderance of the evidence that he is entitled to those damages, then they are not entitled to recover.

"The judge. — That is true. Yes, sir."

This colloquy took place in the presence and hearing of the jury.

E. R. Thayer, (*H. S. Davis* with him,) for Morrison.

G. L. Mayberry, (*J. M. Gibbs* with him,) for Richardson.

MORTON, J. These are cross actions of contract growing out of the same written agreement. The cases are here on exceptions by both parties: by Morrison to the refusal of the judge to rule and instruct the jury that the damages were liquidated, the effect being as he contends to reduce the damages to which he was entitled, and by Richardson to the refusal of the judge to give certain instructions that were asked for and to certain instructions that were given in regard to the auditor's report. There was a verdict for Morrison in each case.

We take up first Morrison's exceptions. The agreement provided for certain doors, sashes, windows and blinds, to be furnished by Richardson within certain specified times varying from one to twenty days, for a building belonging to Morrison, and contained the following stipulation: "In case of any failure on his part to perform this agreement within the time specified according to the tenor thereof said Richardson agrees to pay said Morrison the sum of ten dollars per day until he shall have fully performed said agreement, as damages." At the time when the agreement was entered into Morrison was in possession of the building. A previous contractor had failed, and Morrison was finishing the building himself. There was testimony tending to show, amongst other things, that Morrison called the attention of Richardson to the facts that it was very important that, for the purpose of letting, the building should be ready for the fall season, that he was in a great hurry for the doors which he should put in as received, that he would suffer if he did not get the doors in time, and that he did not wish him to take the contract unless he could comply with its terms, and that thereafter the

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clause in question was inserted in the agreement and the agreement was signed by both parties.

It seems to us plain that considering the circumstances under which the agreement was entered into the stipulation should be construed as being in fact what it purports to be in terms, namely, an agreement between the parties as to the measure of the damages which Morrison would sustain if Richardson did not perform his contract as he agreed to. The matter is one of construction of the written words, but the circumstances under which the contract was entered into, the subject matter and the situation of the parties may and should be taken into account in determining the sense in which the parties used them, and what their intention was. The contract itself shows from the promptness with which delivery was to be made that time was important. This also appears otherwise. Both parties recognized the necessity that there was for promptness of delivery and contracted with reference to it and to the damages which the plaintiff would sustain by delay. And in fixing a per diem compensation at the rate of $10 a day to be paid by the plaintiff as damages until he performed his contract the parties could, it seems to us, have had no other object in view than to estimate and agree beforehand upon what should be taken to be the plaintiff's loss if the defendant did not perform his contract substantially according to the agreement. There is no suggestion of a penalty, and the fact that the contract provided for the delivery of different things at different times does not, it seems to us, render it necessary to construe the stipulation as penal in its nature. It is true that the things to be delivered might vary with respect to their importance and to the damage resulting from failure to deliver at the times named. But the stipulation must be construed, we think, as relating to a substantial and not a trifling or unimportant breach. *Hall* v. *Crowley*, 5 Allen, 304, 306. So construed the rate of compensation cannot be said to be excessive, nor the stipulation to be unreasonable and unconscionable and therefore penal. From the nature of the case the damages would not be easy to determine and the parties well may have chosen to agree upon them beforehand. Neither do we think that the fact that Morrison rented a part of the premises and used a part of the doors affects his right to recover the stipulated damages. He

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was in possession of the premises when the contract was entered into, and it was contemplated, we think, that Morrison could use the articles as furnished, and that there might be a partial breach to which the liquidated damages would apply as well as to an entire breach. This is the only reasonable construction, it seems to us, of the words "until he shall have fully performed." Cases like *Shute* v. *Taylor*, 5 Met. 61, do not, therefore, apply. It follows that the instruction requested by Morrison that the sum of $10 per day is to be treated as liquidated damages and not as a penalty should have been given, and that his exceptions must be sustained. *Lynde* v. *Thompson*, 2 Allen, 456. *Leary* v. *Laflin*, 101 Mass. 334. *Guerin* v. *Stacy*, 175 Mass. 595. *Garst* v. *Harris*, 177 Mass. 72. *Phaneuf* v. *Corey*, 190 Mass. 237. *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642. *Clydebank Engineering Co.* v. *Yzquierdo*, [1905] A. C. 6. *Wallis* v. *Smith*, 21 Ch. D. 243.

Richardson's exceptions remain. The conclusion to which we have come in regard to the stipulation as to damages renders it unnecessary to consider any of them except that relating to what was said by the judge in his charge with reference to the effect to be given to the auditor's report. The sum agreed upon by the parties must be taken to cover and include all damages sustained by Morrison in consequence of Richardson's failure to perform his contract, and therefore the question raised by Richardson's exceptions as to the proper elements of such damage in the absence of such a stipulation cannot arise upon another trial.

There are no doubt some expressions in the charge in regard to the effect to be given to the auditor's report which, taken by themselves, are objectionable. But at the close of the charge the counsel for the defendant called the attention of the judge to the matter and stated in the presence and hearing of the jury what he understood the law to be with regard to the effect to be given to an auditor's report, and the judge assented to it as a correct statement, and, in the course of the colloquy, asked counsel whether he had not told the jury that in substance. We think that the jury must have understood from this that, whatever had been said before by the judge in his charge, the statement then made by the counsel for Richardson, and assented to by the

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judge as a correct statement of the law, was to be taken as his final word regarding the effect to be given by them to the auditor's report. In other words, we think that the jury must have understood that if there had been error in the charge, it was then corrected. *Wyman* v. *Whicher*, 179 Mass. 276.

The result is that Richardson's exceptions must be overruled and Morrison's sustained; but as Morrison's exceptions are only sustained in respect of the damages the new trial thus granted to him will be confined to damages only.

So ordered.

PHILOMENA C. MORENA *v.* JAMES O. WINSTON & others.

Middlesex. January 8, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability *Evidence*, In rebuttal. *Practice, Civil*, Conduct of trial, Exceptions, Judge's charge.

In an action under R. L. c. 106, § 73, by the mother and only next of kin of a boy seventeen years and six months of age, for causing his instantaneous death, if it appears that the deceased had come from Italy and had been in this country only two weeks, that his father had died in Italy six years before, leaving the plaintiff as his widow wholly without means of support, that during the two years before the deceased came to this country he had worked for fifteen cents a day which he gave to the plaintiff and which was her only source of income and that he came to this country to get money for her support, there is evidence for the jury that the plaintiff at the time of the death of the deceased was dependent upon his wages for support within the meaning of the statute.

In an action under R. L. c. 106, § 73, by the next of kin of a boy seventeen years and six months of age, for causing his instantaneous death while employed in a stone quarry of the defendant, from a stone falling upon him owing to the breaking of a chain attached to a derrick by which it was being hoisted, if it appears that the boy had been in this country only two weeks and was employed by the defendant to assist a certain workman who was running a steam drill at the quarry near the derrick by doing what he was told to do by this workman, to whom the duty of instructing him had been delegated by the defendant's superintendent, and it can be found that under the instructions so given to him he had a right to expect that stones would not be swung over his head without a warning cry first being given, and if there is evidence that on this occasion no such warning was given, the question of the due care of the deceased is for the jury, as also is the question whether he had assumed the risk of such an accident.

In an action under the employers' liability act against the proprietor of a stone

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quarry for causing the death of an employee of the defendant through a defect in the condition of the ways, works or machinery of the defendant, if it appears that the death of the employee was caused by a stone falling upon him as it was being swung over his head by a derrick owing to the breaking of a defective link in the chain by which it was suspended, and that the weakness of the link was due to its having been overheated when welded by a servant of the defendant so that its structure became crystallized to a dangerous degree, and there is evidence on which it can be found that the defect in the link might have been discovered by inspection and that no inspection was made, the question of the defendant's negligence is for the jury.

A workman in a stone quarry does not assume the risk of injury from a stone falling upon him owing to the breaking of a defective link in a chain by which it is being hoisted if the defect is unknown to him and is due to the negligence of a servant of his employer in overheating the link when welding it.

An exception to the admission by a presiding judge of evidence in rebuttal cannot be sustained unless the excepting party shows that the evidence was not admitted merely as a matter of discretion.

Language of a presiding judge in his charge to a jury, which may be open to criticism, gives no ground for exception if the judge after hearing the objections to the charge finally leaves the case to the jury correctly in unmistakable language.

TORT under R. L. c. 106, § 73, by the mother and next of kin of Leonardo Morena, dependent upon his wages for support, for causing his instantaneous death without conscious suffering on May 26, 1904, while he was employed in the stone quarry of the defendants at Westford, from a stone falling upon him owing to the breaking of a chain attached to a derrick by which it was being hoisted, with four counts respectively alleging a defect in the condition of the ways, works or machinery of the defendants, the negligence of a superintendent in failing to examine the chain, the failure of the defendants to furnish the deceased with a safe and suitable place to work, and the negligence of a superintendent in failing to warn him that the stone was suspended over his head. Writ dated August 9, 1904.

At the trial in the Superior Court before *Aiken*, C. J., it appeared from evidence offered by the plaintiff that she was the mother of Leonardo Morena; that her husband, the father of Leonardo, had died some six years before Leonardo left Italy to come to this country; that for four years after her husband's death she had no income whatever and lived without any from any source; that two years before Leonardo left Italy he had worked for fifteen cents a day, which he gave her, and upon which she and her children lived; and that she had no

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other source of income. She testified that Leonardo came to this country to get money for her support. It appeared that one Capuana sent money to Italy to pay the passage of Leonardo to this country. At the request of Capuana, who then was employed by the defendants at Fletcher's quarry, the superintendent, one Blades, employed Leonardo. He worked at the quarry from Wednesday of the week preceding his death to the date of the accident, May 26, 1904, and received as wages $10. This was the only amount which he received as wages in this country and this was due from him to Capuana and was collected by Capuana and retained by him on account of this debt.

Capuana, called by the plaintiff, testified that on May 26, 1904, he was working in the quarry of the defendants at Westford; that he had worked there for three summers; that Leonardo Morena was his brother in law, who had been in this country a little over two weeks before he was killed, having come from Italy; that Morena was staying at his house in Westford, and was seventeen years and six months old; that the witness had sent money to Italy for his passage, and when Leonardo arrived in this country Capuana asked Blades, the superintendent of the quarry, to give Leonardo a job; that Capuana at that time was running a steam drill at the quarry near the derrick; that the derrick was on a bank about twelve feet higher than where he was, and sixty feet away, and was being used for hoisting stones from the ledge to a place on the other side of the quarry, where they could be worked upon by the stone-cutters; that Blades told him to bring Leonardo the next day and he would put him on with him to help on the drill; that he brought Leonardo the next day, and Blades told him to go to work with Capuana; that he took him down with him to the drill and was with him all of the time; that Leonardo went to work with him in the morning and went back with him at noon, and went back to work in the afternoon and then back home; that his duties were to do what Capuana told him, such as to get water when Capuana told him he needed it; that the stone drill that he was operating had been in the same spot it was when Morena was killed for four or five days before the accident; that Leonardo was there all those days and had been working for the defend-

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ants about two weeks, and had worked during all this time with Capuana; that usually there was a shout of "Heads up" when a stone was moved over their heads, and when any one said "Heads up" they looked around and saw what was going on and got out of the way; that just before Leonardo was killed Capuana was setting up the drill, had the drill in the hole, had the wrench in his hand to tighten it up, and had told Leonardo to get a little water; that he was not far off; that then while he was tightening it up with the wrench he saw the stone drop; that he did not know what Leonardo was doing at the time he was struck; that he had got the water and left it between the legs of the derrick, and was himself between the legs of the derrick watching Capuana to learn the work while he was getting ready to tighten up the wrench; that the first thing Capuana knew the stone came right down and struck a blow to the drill, and one of the legs of the drill struck him softly on the leg; that he heard no warning, and heard no one say anything; that the stone was on top of Leonardo when he looked; that he appeared dead; that they were quarrying stones a short distance away; that he saw the stone; that the stone was from about two and a half to three feet long; that over his head he saw the derrick and a piece of chain hanging on the block of the derrick, and saw the other part of the chain on the stone.

The conclusions of fact warranted by the evidence are stated in the opinion.

At the close of the evidence the defendants asked the Chief Justice to direct a verdict for the defendants and asked him to make certain rulings. The Chief Justice refused to order a verdict for the defendants or to make the rulings requested, and submitted the case to the jury on the first and second counts under the employers' liability act.

After the counsel for the defendants had objected to certain instructions in the charge, the Chief Justice further charged the jury as follows:

"Gentlemen, the only fault in the case for which there is responsibility in this case is overheating. There is a claim that there was a fracture existing in the chain that is not due to overheating. If you are not satisfied that the overheating was the cause of this accident your verdict is for the defendants. I

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want to have this plain. The case, as it is left to you by the plaintiff in this case, depends upon the overheating of the chain. You must be satisfied that the overheating of the chain left the iron in such a condition that the accident occurred. Unless you are satisfied of that your verdict is for the defendants.

"If the fracture, if there was one that existed, arose from any other cause than overheating, there is no right on the part of the plaintiff to recover. In other words, the plaintiff's case depends upon making out the proposition that the iron was overheated, and that that left the iron in such a condition that the link broke and caused this accident; and unless that is established there is no right in this case to recover."

The jury returned a verdict for the plaintiff in the sum of $2,250; and the defendants alleged exceptions to the refusals to order a verdict for them and to make the rulings requested, and to the instructions given at variance with such requests, and also to the allowance of certain questions put to one Blodgett and to one Fairbairn when called by the plaintiff in rebuttal.

J. T. Connolly, for the defendants.

F. J. Maloney, for the plaintiff.

SHELDON, J. In our opinion there was evidence upon which the jury had a right to find for the plaintiff. The case was submitted to them only on the first and second counts of the declaration; and the judge finally ruled in unmistakable language that the only negligence for which the defendants could be held liable was the furnishing of a chain in which the link that broke and thus caused the accident had been overheated by the blacksmith (who was the defendants' servant) in welding it, so as to weaken it and make it unfit for use. There seems to have been no dispute that this link was welded by the defendants' servant; that the chain then was furnished by the defendants to their derrickmen, to be used in hoisting stone; and that this link broke under the weight of a stone which was being hoisted, and thus caused the accident. There was evidence on which it could be found that this link was overheated and thereby so weakened as to cause the accident, and that this defect in the link might have been discovered by proper inspection. The jury now must be taken to have found that these facts were proved; and also that the deceased was himself in the exercise

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of due care and had not assumed the risk of the accident which happened; and that the plaintiff was dependent upon his earnings for support. It seems to have been conceded that proper notice was given; that the deceased died without conscious suffering; and that the plaintiff was his only next of kin. Accordingly the verdict for the plaintiff must stand unless some one or more of the defendants' specific objections are found to have been well taken and to be material.

1. The question whether the plaintiff was dependent for support upon the wages of the deceased, her son, properly was left to the jury. *Boyle* v. *Columbian Fire Proofing Co.* 182 Mass. 93, 100. *Mulhall* v. *Fallon*, 176 Mass. 266, and cases there cited. Apparently she had no other means of support, and this is more than enough to satisfy the statute. *Mehan* v. *Lowell Electric Light Co.* 192 Mass. 53. *McNary* v. *Blackburn*, 180 Mass. 141, 144. *Houlihan* v. *Connecticut River Railroad*, 164 Mass. 555. The case differs from *Hodnett* v. *Boston & Albany Railroad*, 156 Mass. 86.

2. There was evidence that the deceased was in the exercise of due care. He was in Capuana's immediate presence, ready to assist him, as it was his duty to be. The instructions which he had received from Capuana, to whom the duty of instructing him had been delegated by the defendants' superintendent, are to be treated as if they had been given by the defendants themselves. *Dolan* v. *Boott Cotton Mills*, 185 Mass. 576, 581. *La Fortune* v. *Jolly*, 167 Mass. 170. *Bjbjian* v. *Woonsocket Rubber Co.* 164 Mass. 214, 220. But under these instructions it might be found that he had a right to expect that stones would not be swung over his head without a warning cry first being given, and that it was not careless for him to act upon this expectation. For the same reasons it cannot be said as matter of law that he had assumed the risk of such an accident, though doubtless the jury might have found that this was the fact. *Garant* v. *Cashman*, 183 Mass. 13, 18. *Graham* v. *Badger*, 164 Mass. 42, 48.

3. There was evidence of negligence for which the defendants were responsible under the provisions of R. L. c. 106, § 71. The jury might have found that the chain which broke was furnished by the defendants to be used with the derrick, constituting with

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the derrick the machinery or instrumentality intended to be used in moving stones out of the quarry to the place in which they were to be wrought. It was like the rope which was used with a derrick in *Graham* v. *Badger*, 164 Mass. 42, 48, and which is there spoken of as one of the defendant's "permanent appliances." They furnished this chain to be used as a permanent instrumentality for the very purpose and in the very manner in which it was being used. *Haskell* v. *Cape Ann Anchor Works*, 178 Mass. 485. They are not excused by the fact that they bought their chains from reputable makers; for the jury might have found (if indeed this question was in dispute) that not only was the link which broke weak and unfit for use, but that this weakness was due to a fault of the defendants' servant whom they had entrusted with the duty of preparing and fitting it for use in allowing it to become overheated so that its structure became crystallized to a dangerous degree. It was their duty to provide reasonably safe and proper appliances and machinery for the conduct of their business so far as this could be secured by the exercise of proper care; and if they chose to delegate the performance of this duty to one of their servants they became responsible for his negligence both under the statute and at common law. R. L. c. 106, § 71, cl. 1. *Boucher* v. *Robeson Mills*, 182 Mass. 500. *Haskell* v. *Cape Ann Anchor Works*, 178 Mass. 485, 486, 487. *Moynihan* v. *Hills Co.* 146 Mass. 586, 591, *et seq.* *Cushing* v. *Smith Iron Co.*, *ante*, 310.

The defendants, under the instructions given to the jury, could not have been held for any negligence of the derrickman in failing to give the usual warning to his fellow servants, or in selecting a weak chain when a sufficient number of suitable chains had been provided; and the cases of *Johnson* v. *Boston Tow-Boat Co.* 135 Mass. 209, and *Harnois* v. *Cutting*, 174 Mass. 398, are not applicable. See *Ford* v. *Eastern Bridge & Structural Co.* 198 Mass. 89.

There was evidence on which the jury could find that the defect in this link might have been discovered by inspection, but that no inspection was made. Indeed, the defendants do not assert that any inspection was made; they contend that there were no practicable methods of inspection, and that the methods suggested by the plaintiff in the testimony put in would offer no

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protection to their servants. But this was plainly a question for the jury. *Harris* v. *Putnam Machine Co.* 188 Mass. 85. *Murphy* v. *Marston Coal Co.* 183 Mass. 385. *Toy* v. *United States Cartridge Co.* 159 Mass. 313.

The jury might well have found that the direct and proximate cause of the accident was the breaking of the chain through the weakening caused by the overheating of the link which broke. The risk of the existence of such a defect, unknown to the servant, is never assumed by him. *Hopkins* v. *O'Leary*, 176 Mass. 258, 264, and cases there cited. And, even if the jury might have found on the evidence that the breaking of the chain was due not to the weakening of the link but either to a former fracture or to some other cause, yet under the instructions given to them it is manifest that they have not done so.

4. The presiding judge had a right in the exercise of his discretion to admit in rebuttal the testimony of Blodgett and Fairbairn, and the bill of exceptions does not show that this evidence was not admitted as a matter of discretion merely.

5. It may be that some of the language used in the charge was open to criticism; but the defendants have no right to complain of this, in view of the manner in which the case finally was left to the jury.

We have considered all the questions which have been argued for the defendants. It is not necessary to take up specifically the many different requests for instructions which were presented. They all are disposed of by what has been said. There was no material error at the trial.

Exceptions overruled.

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THOMAS R. COATES *vs.* JOHN C. SOLEY & another.

Suffolk. January 9, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability.

In an action under R. L. c. 106, § 71, cl. 2, by a teamster against his employer for personal injuries received when assisting in moving a wooden house, alleged to have been caused by the negligence of a superintendent of the defendant, it appeared that a person, who was admitted to be a superintendent within the meaning of the statute, ordered the plaintiff to unhitch his horse from the wagon in order to haul certain heavy timbers up to the house, and ordered another workman to make fast to the timber, which he did, that the plaintiff hitched to the timber and started the horse but the chain slipped, and as the plaintiff was in the act of prying two of the timbers apart, to make it easier for the horse to haul the timber to which the chain was attached, the superintendent took hold of the horse's head and started him, causing the plaintiff to be caught between two timbers and injured. *Held*, that there was evidence of due care on the part of the plaintiff and of negligence on the part of the superintendent; and that the act of the superintendent in starting the horse, although in itself an act of manual labor, could be found to have been done as an act of superintendence for the purpose of assisting in doing what he as superintendent had ordered to be done.

TORT under R. L. c. 106, § 71, cl. 2, for personal injuries received on October 20, 1903, while in the employ of the defendants assisting in the moving of a wooden house, through the alleged negligence of a person entrusted with and exercising superintendence. Writ dated April 14, 1904.

At the trial in the Superior Court before *Holmes*, J., the evidence tended to show the following facts: The plaintiff, who was a teamster by occupation, had been employed by the defendants off and on for about fifteen years, and had been employed by them steadily for one year before the accident. During the fifteen years he was with the defendants he occupied different positions, chiefly that of teamster. The defendants were engaged in the work of moving buildings and the plaintiff frequently assisted directly in this work, in addition to his duties as teamster. At the time of the accident the defendants were engaged in moving buildings upon certain land recently purchased by the United States Government in Nahant. The portion of the work

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on which the plaintiff was engaged was in charge of a foreman named Murray, who was admitted to be a superintendent within the meaning of the employers' liability act, and who, at the time of the trial, was still in the employ of the defendants. At the time of the accident there were five men besides the foreman in the plaintiff's gang, all of whom testified in behalf of the plaintiff except one who at the time of the trial had removed to Newfoundland.

The plaintiff testified that on the morning of the day of the accident Murray and his gang drove on the plaintiff's team from the railroad station, and when they got to the place of work Murray said he wanted the plaintiff to work with him on that day. The accident happened directly after the men had returned to work at the end of the noon hour. At that time they were about to move certain timbers up to a house which was in the process of being moved. Murray told the plaintiff to unhitch his horse from the wagon, so they could haul the timbers up instead of carrying them. The plaintiff took the horse out of the wagon and took him round to the ends of the timbers. These timbers were three in number and were lying parallel to the house, twenty-five to thirty feet from the house, the elevation of which was about ten or twelve feet higher than that of the timbers. The timber nearest to the house was thirty-three feet long and ten by twelve inches, the centre timber eight by ten inches and about the same length, the one farthest from the house was thirty feet long and ten by twelve inches, and there was a space of about a foot between each of the timbers. All three were hard pine, square timbers. The first piece of timber to be moved was the one farthest from the house. Murray said to the plaintiff, "Tom, unhitch the horse and we will haul that timber up, it would be a good deal better than to carry it up." The plaintiff described the accident as follows: "He (Murray) directed one of the men to make fast to the timber, and I made fast the horse to the whiffletree and I went to start the horse — I did start the horse and the timber moved a little bit and the chain slipped and I went back. . . . I said, 'Wait a minute and I will get a bar,' and as I did I stepped over the timbers and run up to the house and I run back again and I stepped over this timber and in the act of putting the bar between the two timbers to

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kind of separate them to make it easy for the horse to pull the timber, the foreman started the horse and pulled the timber right up in that shape and caught me right in here."

Members of the gang who were working with the plaintiff testified that the horse was started by Murray while the plaintiff was placing the bar between the timbers near Murray and within his sight. Murray himself, who was the only witness called by the defendants, testified that he took the horse by the head and started him. The plaintiff testified on cross-examination that the horse was a quick moving horse when he started. Murray testified "When I took hold of him, the horse took the motion just about the same time. He was quick movement and he took the motion about the same time. . . . The horse started and Coates landed in between here as the stick rolled over." He testified that when he put his hand on the bridle of the horse to start him ahead the plaintiff was not between the two sticks of timber.

The plaintiff testified that the horse was a very quiet one and that during the time he had been working with it, which was almost a year, he never knew this horse to start without being urged or spoken to.

At the close of the evidence the defendants asked the judge to rule that the plaintiff was not entitled to recover, and that the starting of the horse, under all the circumstances, was not an act of superintendence. The judge refused to make either of these rulings and submitted the case to the jury. They returned a verdict for the plaintiff in the sum of $2,433.33; and the defendants alleged exceptions.

W. H. Hitchcock, for the defendants.

P. R. Blackmur & J. B. Sullivan, Jr., for the plaintiff, were not called upon.

MORTON, J. We think that there was evidence warranting a finding that the plaintiff was in the exercise of due care and that the accident was due to a negligent act of superintendence on the part of Murray. It could have been found, and for aught that appears it was found, that in taking an iron bar and prying the timbers apart the plaintiff was engaged in the performance of work which he was hired to do, and that he had no reason to suppose that Murray would start the horse or that the horse

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would start of its own motion. It could not have been ruled therefore that he was wanting in due care.

The exceptions recite that it was admitted that Murray was "a superintendent within the meaning of the employers' liability act." There was evidence tending to show that Murray directed the plaintiff to unhitch the horse from the wagon so as to haul the timber up to the house and directed one of the men to make fast to the timber, which he did, and that the plaintiff thereupon hitched on to the timber and started the horse, but the chain slipped, and as he was in the act of prying the timbers apart so as to make it easier for the horse to pull the timber, Murray took hold of the horse's head and started it up causing the injury complained of. It is plain we think that Murray's act in starting up the horse was or could have been found to be done as an act of superintendence for the purpose of assisting in doing what as superintendent he had directed to be done, and therefore to derive its quality not from the mere act of manual labor which was necessary in starting the horse, but from the exercise of the controlling authority which he had as superintendent. *Meagher* v. *Crawford Laundry Machinery Co.* 187 Mass. 586. *McPhee* v. *New England Structural Co.* 188 Mass. 141. Whether there was negligence on Murray's part was clearly for the jury. It follows that the rulings that were requested were rightly refused.

Exceptions overruled.

MARY E. SUTTON *vs.* DAVID GOODMAN.

Suffolk. January 9, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Landlord and Tenant. Words, "Expiration."

Where there is a covenant in a lease that a sum of money deposited by the lessee as security for the performance of the terms of the lease shall be returned at the expiration of the lease if no default shall have been made, or, if a default shall have been made, the lessor "may retain so much thereof as will properly com-

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pensate him, and the balance, if any, shall, upon the expiration of this lease, be paid to said lessee," a termination of the lease by the lessor by lawfully evicting the lessee for non-payment of rent is an "expiration" of the lease within the meaning of the covenant.

A lessor who terminates a lease by entering and expelling the lessee for non-payment of rent cannot recover from the lessee for the loss of rent sustained by him in consequence of such termination unless the lease contains a covenant giving him that right.

Where by the terms of a lease the rent is payable in advance in monthly instalments on the first day of each month during the term, and the lease provides that upon a failure by the lessee to pay any of the monthly instalments when due the lease at once shall become null and void, if, after a default in the payment of rent on the first day of a month, the lessor on the second day of the month terminates the lease in accordance with its terms, he cannot recover from the lessee the rent for that month.

In an action to recover the sum of $300 deposited with the defendant as security for the performance of the terms and obligations of a lease to the plaintiff which the defendant had terminated, it appeared that by the terms of the lease the rent of $75 a month was payable in advance on the first day of every month during the term, and that upon the failure by the lessee to make any of the monthly payments when due the lease should at once become null and void, the lessor being given the right to enter and expel the lessee. The lessee further agreed to pay the rent during the term, "and for such further time as [he] may hold the said premises." On the first day of a month the plaintiff made default and refused to make further payments of rent under the lease. On the second day of the month the defendant terminated the lease and ordered the plaintiff to quit the premises, but the plaintiff continued to occupy the leased premises until the twenty-second of the month when the defendant expelled him and took possession. The lease contained the following provision in regard to the $300 deposited by the plaintiff as security: "If a default, however, shall have been made, then the [lessor] may retain so much thereof as will properly compensate him, and the balance, if any, shall, upon the expiration of this lease, be paid to said lessee." *Held*, that under the provision last quoted the plaintiff was entitled to recover the balance of the deposit after deducting the amount of the rent for the twenty days from the day when the lease rightfully was terminated by the defendant until the day when the plaintiff was expelled, the plaintiff having agreed to pay rent not only during the term but for such further time as he might hold the premises, but that the defendant, having terminated the lease, was entitled to no damages for its termination, in the absence of a covenant to make up any loss of rent sustained in consequence of such a termination, such as was enforced in *Edmands* v. *Rust & Richardson Drug Co.* 191 Mass. 123.

CONTRACT by the assignee of Walter S. Harris for $300 deposited by Harris with the defendant as security for the performance of the terms of a lease of certain property numbered 114–118 on Washington Street in Boston, which had been terminated by the defendant. Writ in the Municipal Court of the City of Boston dated February 27, 1906.

On appeal to the Superior Court the case was tried before

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Bond, J., without a jury. The material parts of the lease were as follows:

"To hold for the term of five years and four months beginning with the first day of October A. D. 1905, yielding and paying therefor the rent of nine hundred dollars per year during said term by equal monthly payments in advance of seventy-five dollars each payable on the first day of each month beginning with the said October 1, 1905; and said lessee does promise to pay said rent as aforesaid and also at the termination of this lease to pay rent proportionately for any part of the month then unexpired; and the lessee agrees to quit and deliver up the premises to the said Goodman or his attorney peaceably and quietly at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are or may be put into by the said Goodman, and to pay the rent as above stated during the term above stated, and for such further time as said Harris may hold the said premises; and not to suffer or make any waste thereof, nor lease, nor underlet or permit any other person or persons to occupy or improve the same or make or suffer to be made any alterations therein, except with the approbation of the Fifty Associates, lessors of said Goodman having been first obtained; and the said Goodman may enter to view and make improvements and to expel said Harris if he shall fail to pay the rent as aforesaid, or make or suffer any strip or waste thereof. It is further agreed between the parties that at the option of said Goodman upon the failure by the lessee to pay any or either of the monthly payments when due, this lease shall at once become null and void. And whereas the said lessee has deposited in the hands of said Goodman the sum of $300.00, it is agreed that the said sum of $300.00 is now in the hands of said Goodman as security for the performance by said lessee of the terms and obligations of this lease, and, upon the expiration of this lease, if no default shall have been made by said lessee in any respect, then the said $300.00, or so much thereof as may be retained by said Goodman shall be refunded to said lessee with interest at the rate of two percent per annum. If a default, however, shall have been made, then the said Goodman may retain so much thereof as will properly compensate

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him, and the balance, if any, shall, upon the expiration of this lease, be paid to said lessee. Furthermore, the said Goodman hereby acknowledges that he has this day received from said Harris the sum of seventy-five dollars as rent for the first month of the term herein granted."

Harris paid the rent due for November on the first day thereof. The rent for December he did not pay on the first day, but paid in several payments, the last one being made on December 23. On January 1, 1906, the defendant called at the premises to obtain the rent, but could not get it. He called on the second day of January and saw Harris and asked him for the rent. Harris said that he had no money and could not pay it. The defendant asked him when he could pay it, and Harris did not give him any definite answer, and the defendant testified that Harris then refused to pay him any rent under the lease. Harris testified that he then was unable to pay. Thereupon, on January 2, 1906, the defendant caused to be written to Harris a letter, terminating the lease for non-payment of rent and giving him notice to move at once.

Harris made no answer to this letter, and remained in the premises, and on January 5 the defendant brought an action of ejectment returnable in the Municipal Court of the City of Boston on the thirteenth day of January, 1906. Harris entered no appearance and was defaulted, and an execution was issued to the defendant on January 22, 1906, under which the defendant caused the goods of Harris to be removed and took possession of the premises. Thereupon the defendant caused letters to be written to Harris asking his assistance in getting a new tenant for the property and telling him that the loss would be charged to him. By a letter dated January 24, 1906, notice of the assignment from Harris to the plaintiff was given to the defendant, and a demand was made by the plaintiff for the payment of the $300 deposited with the defendant as security. The defendant spent considerable money and time in trying to find a new tenant, and the best he could do was to get one who would pay $53 a month, who occupied the premises after about two months. After possession was taken under the execution Harris disclaimed any rights in the premises and said he was not concerned in any way in the steps taken by the defendant to

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obtain a new tenant. The defendant asked the judge to make the following rulings:

1. That on all the evidence the plaintiff has no claim against the defendant.

2. That any cause of action the plaintiff may have against the defendant will not accrue until the date set as the termination of the lease.

3. That if Harris, the lessee, made a breach of the conditions of the lease Goodman is entitled to damages therefor.

4. That if Harris made a breach of the conditions of the lease Goodman is entitled to hold back sufficient of the $300 placed in his hands to make himself whole.

5. That the fact that Goodman used the power under the lease to annul the lease on account of the non-payment of rent does not constitute a waiver of the right of Goodman to recoup himself for damages out of the $300 deposited with him as security.

6. That the defendant Goodman is entitled to charge up against the amount of $300 the difference between $75 per month and $53 per month, which is $22.

7. That this suit is prematurely brought.

8. That Goodman will have the right to charge up against the deposit of $300 the loss which shall accrue to him on account of the breach of condition by Harris during the time that the lease was to continue by its terms, to wit, five years from the date thereof.

9. That Harris committed a breach of the conditions of the lease when he refused and neglected to pay the rent.

The judge made the ninth ruling and refused to make the others, and further ruled that the defendant, having exercised his option to declare the lease null and void after the breach of Harris, by the letter of January 2, 1906, the lease could not be made the basis for a claim of damages after that date, and found for the plaintiff in the sum of $300, with interest at the rate of two per cent per annum, making $306.97. The defendant alleged exceptions.

J. E. Young, for the defendant.

H. Dunham, for the plaintiff.

SHELDON, J. By the terms of the lease to Harris, the plain-

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tiff's assignor, it was to become null and void at the defendant's option, upon the failure by the lessee to pay any or either of the monthly payments of rent when due. Harris paid the rent up to the first day of January, but failed to pay the monthly rent which became due in advance on that day. Thereupon the defendant, on January 2, 1905, by notice to Harris, declared the lease null and void, and afterwards actually ejected him from the leased premises, upon an execution taken out on a judgment obtained against him under R. L. c. 181. The plaintiff now sues to recover the deposit made by Harris as security for the performance by him of the terms and obligations of the lease; and the defendant claims that the action was prematurely brought and cannot be maintained, and that he at any rate has the right to deduct from the amount of the deposit all that he has lost and is liable to lose by Harris's breach of the terms of the lease and by the fact that it has been found impossible to relet the premises except for a much smaller rent than was reserved in the original lease. The specific questions which come before us are upon the defendant's exception to the judge's refusal to give certain rulings for which he asked.

It was impossible to rule that the plaintiff had no claim against the defendant. Doubtless her rights are no greater than those of Harris would have been; but he himself could have maintained an action upon the defendant's covenant to repay the deposit to him. The defendant had chosen to terminate the lease, and it had become null and void. This was the expiration of the lease within the meaning of those words in the defendant's covenant. The provisions of R. L. c. 129, § 8, do not apply here; but even if the rent for the month of January could be apportioned under that statute (see *Withington* v. *Nichols*, 187 Mass. 575) yet as the defendant actually ejected Harris on the twenty-second day of that month, he could not be entitled to deduct more than twenty-two days' rent, which would leave in his hands a considerable amount for which the plaintiff, at the date of her writ, had a clear right of action. For the same reason the action was not prematurely brought. The first, second and third requests could not have been given.

The sixth and eighth requests rightly were refused. The lease became terminated when the defendant exercised his

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option to declare it null and void. It did not, as in *Edmands* v. *Rust & Richardson Drug Co.* 191 Mass. 123, contain any covenant by Harris to make up any loss of rent that might follow such a termination. Having terminated the lease and evicted the lessee, the defendant, under the terms of this lease, had no further claim against the lessee.

The fourth and fifth requests are in themselves correct statements of the law. Whether they are applicable to the case and should have been given depends upon whether it appears that the defendant has sustained any damage which he has the right to deduct from the deposit. Harris's default was a failure to pay the rent which was payable in advance on the first day of January for that month. The defendant, as he had a right to do, terminated the lease on the second day of January; but Harris continued to occupy the leased premises until January 22, when the defendant actually evicted him. Under Harris's covenant in the lease to pay the rent during the term "and for such further time as said Harris may hold the said premises," the defendant could require him to pay rent until the premises were actually given up, unless he had lost this right by his eviction of Harris during the month. This eviction was lawful, for it was in accordance with the covenants of the lease. Harris's default was without excuse; he should have paid the rent that became due and payable on the first day of January. But this monthly rent was an indivisible item; and while it was payable in advance before the defendant elected to terminate the lease, yet that election and termination of the tenant's rights destroyed the right which the defendant previously had to require the payment of the rent for that month, and destroyed it as to the whole amount of that rent. *Hammond* v. *Thompson*, 168 Mass. 531. There can be no apportionment of the rent. *Knowles* v. *Maynard*, 13 Met. 352. *Dexter* v. *Phillips*, 121 Mass. 178, 180. But Harris continued in occupation until January 22, when the defendant expelled him and took possession. The defendant's right to recover rent as such for the month of January was destroyed by his termination of the lease on the second day of the month. *Smith* v. *Shepard*, 15 Pick. 147. *Nicholson* v. *Munigle*, 6 Allen, 215. The lease expired accordingly on the second day of January, and the defendant lost his right to the rent for that month.

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But Harris under his covenant was held to pay rent at the rate stated in the lease for the twenty days during which he occupied after its termination; and the defendant had the right to deduct this amount from the deposit which was made as security. *Rice* v. *Loomis*, 139 Mass. 302. The attention of the judge was called by the requests to this subject, and we are of opinion that the fourth and fifth requests should have been given. *Emmes* v. *Feeley*, 132 Mass. 346. It is not necessary however that the whole case should be retried. The defendant is entitled to no further deduction than the amount of rent for twenty days, which would be $50, or one sixth part of the deposit. The order will be that if the plaintiff shall remit the sum of $51.16, being one sixth part of the finding in her favor, the exceptions are to be overruled; otherwise

Exceptions sustained.

FRANCIS E. MEANEY *vs.* CITY OF BOSTON.

Suffolk. January 10, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Way, Defect in highway.

If a traveller on a bridge which it is the duty of a city to maintain as a public highway, after waiting for a draw of the bridge to be closed and the gates at the ends of the draw to be opened, walks forward upon the sidewalk of the draw and is struck and injured by one of the gates rebounding from the fence to which it should have latched itself when thrown back, and if the accident was not caused by want of care on the part of the traveller or by negligence on the part of the gate tender in throwing back the gate but was due wholly to a defect in the latch of which the city ought to have known, this constitutes a defect in the highway, for an injury caused by which the traveller can recover from the city under R. L. c. 51, § 18.

TORT under R. L. c. 51, § 18, against the city of Boston for personal injuries from being struck by a gate on the Warren Bridge, leading across the Charles River from that part of Boston called Charlestown, under the circumstances stated in the opinion. Writ dated January 14, 1901.

In the Superior Court the case was tried before *Bell*, J., who

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at the close of the evidence ruled that upon all the evidence the action could not be maintained and ordered a verdict for the defendant. The plaintiff alleged exceptions.

G. F. Ordway, for the plaintiff, was not called upon.

J. D. McLaughlin, for the defendant.

LORING, J. On the morning of December 24, 1900, the plaintiff was crossing Warren Bridge on his way to Boston. When he reached the draw he found it open and the gates across the bridge shut. He waited until the draw was shut and the gates across the bridge were thrown back by the gate tender. He then went forward and was struck by the gate across the sidewalk on which he was walking rebounding from the fence to which it should have latched itself when it was thrown back.

By St. 1874, c. 259, § 2, the duty of maintaining this bridge as a public highway is put upon the defendant.

The necessary notice was given, and the evidence warranted the jury in finding that the accident was caused by a defect in the latch; that the defendant ought to have known of it; and that the accident was not caused in whole or in part by want of care on the part of the plaintiff or by negligence on the part of the gate tender in throwing back the gates. This is not seriously contested by the defendant.

The defendant's contention is that the defendant is not liable for a defect in a highway under the statute (now R. L. c. 51, § 18), if the obstacle which constitutes the defect is in use at the time; and it relies on what is said by Barker, J. in *Griffin* v. *Boston*, 182 Mass. 409, 411, and on the cases of *Barber* v. *Roxbury*, 11 Allen, 318; *Pratt* v. *Weymouth*, 147 Mass. 245; *Lyons* v. *Brookline*, 119 Mass. 491; *Marble* v. *Worcester*, 4 Gray, 395.

There is nothing in these cases which supports this contention. The cases of *Pratt* v. *Weymouth*, *Barber* v. *Roxbury*, and *Marble* v. *Worcester* are cases in which the rule was applied that the defect in the way must be the sole cause of the injury, as to which see *Block* v. *Worcester*, 186 Mass. 526. See also the earlier cases of *Palmer* v. *Andover*, 2 Cush. 600; *Rowell* v. *Lowell*, 7 Gray, 100; *Kidder* v. *Dunstable*, 7 Gray, 104; *Alger* v. *Lowell*, 8 Allen, 402; *Flagg* v. *Hudson*, 142 Mass. 280; *Hayes* v. *Hyde*

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Park, 153 Mass. 514; *Coles* v. *Revere*, 181 Mass. 175. The case of *Lyons* v. *Brookline*, 119 Mass. 491, went on the same ground, and on the additional ground that the plaintiff was not a traveller and did not have the rights of one. What was said by Barker, J. in *Griffin* v. *Boston*, 182 Mass. 409, 411, is to the same effect. In that case Barker, J. did not stop when he said that the city is not liable if when the injury is done "the obstacle which constitutes the defect is in use." He added: "and the acts of persons who are using it contribute to or are the moving cause of the injury," citing *Barber* v. *Roxbury* and *Pratt* v. *Weymouth*. This is nothing more than a statement that the defect must be the sole cause of the injury.

In the case at bar the defect was the sole cause of the injury if the gate tender exercised due care in throwing back the gate in question.

Exceptions sustained.

ERNEST R. HUBBARD *vs.* HENRY G. LAMBURN & trustee, HENRY G. LAMBURN & another, claimants.

Middlesex. January 10, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Trustee Process. Evidence, Res inter alios.

At the trial of an action begun by trustee process, where the defendant and another appear under R. L. c. 189, § 32, as claimants of the fund in the hands of the trustee which they allege to have been their partnership property, and the only issue for the jury is whether the claimants have maintained their claim to the fund, it is error for the presiding judge to exclude the answers of the trustee to interrogatories propounded to him by the plaintiff under c. 189, § 11, containing statements of acts and conduct of the defendant from which it can be argued that he was the only person interested in the alleged partnership.

In an action begun by trustee process, where a claimant of the fund in the hands of the trustee has appeared under R. L. c. 189, § 32, which permits him to "allege and prove any facts which have not been stated nor denied by the supposed trustee," on the trial of the issue between the plaintiff and the claimant, the statements contained in the answers of the trustee to interrogatories propounded to him by the plaintiff under c. 189, § 11, are not *res inter alios* nor to be treated as hearsay, and so far as they are material must be laid before the jury.

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SHELDON, J. In this action of contract brought by trustee process, one Iliffe was summoned as a trustee of Henry G. Lamburn, the defendant; and Henry G. Lamburn and Arthur Lamburn, as copartners under the name of H. G. Lamburn and Company, claimed the fund in the hands of the trustee as their property. At the trial in the Superior Court of the issue between these claimants and the plaintiff, after the decision in this case reported in 189 Mass. 296, it appeared that the alleged trustee was indebted to H. G. Lamburn and Company for some work done under a written contract, and the question was whether this work had been done by the defendant individually or by the claimants as a partnership. The single issue submitted to the jury was whether the claimants had maintained their claim to the funds in the hands of the trustee. The claimants offered evidence tending to show the existence of the partnership at the time the work was done. At the conclusion of the claimants' case, the plaintiff offered in evidence the trustee's sworn answers to interrogatories propounded to him by the plaintiff under R. L. c. 189, § 11; and these having been excluded by the judge, and the jury having found in favor of the claimants, the case comes before us upon the plaintiff's exception to the exclusion of these answers of the trustee.

In our opinion these answers should have been admitted. They contained statements of acts and conduct of Henry G. Lamburn upon which it might have been argued that he was the only person interested in the alleged partnership. It is true that he was the defendant in the action; but he was also one of the claimants, and his acts and conduct were accordingly material. Nor were the answers of the alleged trustee *res inter alios* as to the claimants, or to be treated merely as hearsay. The statute giving them the right to appear in the original action for the purpose of determining their title provides that they "may allege and prove any facts which have not been stated nor denied by the supposed trustee." R. L. c. 189, § 32. This provision cannot be given full effect if the trustee's answers which contain his statements and denials, so far as material, are not to be laid before the jury. And it is for this reason that it was held in *Clinton National Bank* v. *Bright*, 126 Mass. 535, that the rule as to the conclusiveness of

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a trustee's answers should be applied if an adverse claimant has appeared as in an ordinary case. R. L. c. 189, § 15. The trustee's answers were received, and made the basis of decision, on issues between the plaintiff and the claimants, in *Mulhall* v. *Quinn*, 1 Gray, 105; *Taylor* v. *Lynch*, 5 Gray, 49; *Wilde* v. *Mahaney*, 183 Mass. 455; and *Chapin* v. *Pike*, 184 Mass. 184. They were said to be conclusive upon a claimant in *Sheehan* v. *Marston*, 132 Mass. 161, 162. Apparently they were so treated in the Superior Court in *Butler* v. *Butler*, 162 Mass. 524, without objection on this point.

Jones v. *Stevens*, 5 Met. 373, the only decision cited by the claimants, was not a case of trustee process, and has no bearing upon the question here considered.

Exceptions sustained.

S. W. Mendum, for the plaintiff.

J. L. Powers, for the claimants, submitted a brief.

JAMES F. M. FARQUHAR *vs.* ROBERT FARQUHAR.

Middlesex. January 10, 11, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Pleading, Civil, Declaration. *Contract*, Implied: common counts. *Equity Jurisdiction*, Mistake. *Evidence*, Extrinsic affecting writings. *Practice, Civil*, Verdict, New trial.

Where a declaration contains two counts alleging false representations whereby the plaintiff was induced to make a contract in writing, of which a copy is annexed, and also a third count, alleged to be for the same cause of action, for money had and received, with a bill of particulars annexed containing numerous items made up on the basis of an oral agreement alleged to have been made at a date two days earlier than the date of the agreement in writing referred to in the first and second counts, but not referring to the agreement, the third count is not bad on demurrer, as the allegation that it is for the same cause of action as the other counts does not incorporate the agreement in writing as a part of the third count, and under that count it is open to the plaintiff to prove the oral agreement on which it is based in case the agreement in writing is not proved.

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One who has purchased a business under a contract in writing for a sum of money named in the contract cannot maintain an action for money had and received against the seller to recover a part of the sum paid on the ground that there was a mistake in the computation of the value of the business by which the price was fixed. If there was such a mistake the purchaser's only remedy is a suit in equity to reform or set aside the contract.

A party to a contract of sale in writing cannot contradict it as to the price to be paid.

Where a declaration contains two counts alleging false representations whereby the plaintiff was induced to make a certain contract in writing, and also a third count, alleged to be for the same cause of action, for money had and received, and at the trial of the action the presiding judge instructs the jury, that if the plaintiff fails on the first and second counts they are to consider the third count, and says "if we find that you report your verdict on the third count, by your silence on the other counts, we shall infer that your verdict is favorable to the defendant on the first and second counts," and if the jury return no verdict on the first or the second counts but return a verdict for the plaintiff on the third count, which upon exceptions to the rulings of the presiding judge is set aside by this court, the new trial granted on sustaining the exceptions will not be limited to the third count, as the jury may have rendered no verdict on the first and second counts for the reason that they failed to agree on those counts.

LORING, J. Before June 26, 1896, James Farquhar the plaintiff, Robert Farquhar the defendant, and their brother John were partners in the business of seedsmen. On that day James and John sold to Robert their interest in the business, not including the good will, on the basis of the whole business being worth $45,000. James and John immediately took measures to open a competing seed store. Between August 3, 1896, and August 7, 1896, negotiations were carried on between James and Robert (John being then in Europe) for the sale by Robert of his business to James and John, or to James alone. James testified and the auditor found that on August 5 James agreed to buy and Robert agreed to sell the business on the basis of the sale of June 26 (exclusive of cash and good will) and that the amount due on that basis was to be ascertained by a clerk employed by Robert, by the name of Nilsson. On August 7, Robert presented several papers showing the amount due to be about $30,000, and the written agreement of August 7, 1896, was written out and signed. Robert testified that he never agreed to sell on the basis of the sale of June 26, the necessary changes by reason of subsequent transactions being computed by Nilsson; that he drew off the figures presented as an estimate, which were referred to more or less in the negotiations,

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and finally a trade was struck for $30,000 and the agreement of August 7 was written out and signed.*

Some three years afterwards the plaintiff discovered that the figures had not been made by Nilsson, and that there were mistakes which the auditor found amounted to $7,506.32. He thereupon brought this action.

The declaration contains three counts.

In the first the plaintiff counts on a false and fraudulent representation, to wit, that the statement was made by Nilsson and that it was an accurate statement of the defendant's doings in the business after June 26, by which representation he was induced to pay the defendant $30,000 for the business.

In the second he counts on the same false and fraudulent representation, and here alleges that he was thereby induced to enter into the written contract of August 7, 1896.

The third is a count for $8,751.90, money had and received to the plaintiff's use. The bill of particulars annexed to the third count contains one hundred and forty-five items, and is a statement made up on the basis on which the auditor found that the defendant agreed to sell and the plaintiff to buy on August 5, 1896.

A demurrer to the third count was filed by the defendant and overruled. To this the defendant excepted.

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* This agreement was as follows:

"Boston, August 7th, 1896.

"To Mr. James F. M. Farquhar,
17 Merchants Row,
Boston.

"I hereby agree to sell and make over to my brother James F. M. Farquhar, (in order to prevent the disgrace and growing rivalry of brothers divided) my entire business as it stands tonight for the sum of thirty thousand dollars excepting only that cash on hand and cash in banks shall belong as from this day only, to me and is not included in above sale. It is also understood and agreed that a bonus of not less than five thousand dollars shall be paid me. Papers to pass and payment of the thirty thousand dollars in cash or satisfactory securities to be made within two months from date. The bonus to be paid within five years. I hereby agree not to rival you in the seed business for three years.

"Robert Farquhar."

"I accept the above offer and agree to the conditions.

"James F. M. Farquhar.

"Aug. 7th, 1896."

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At the trial the defendant asked the presiding judge to rule as to the third count "that in considering any liability of the defendant under the same, the only contract between the parties was that in writing dated August 7, 1896, the counsel for the defendant stating to the judge that the ground for such request was that in the absence of fraud, all the preceding oral negotiations and statements as to the terms of the contract, made by the parties thereto must be taken to have been merged in the instrument of August 7, 1896."

This was refused by the judge, and the defendant excepted. The judge instructed the jury in substance that if the agreement was an agreement to sell on a computation to be made by Nilsson and there was an error in the computation, the plaintiff could recover under the third count the amount of that error. But if the agreement made by and between the plaintiff and the defendant was an agreement to sell for $30,000 arrived at not by computation under a preceding agreement but as the result of trading and dickering the plaintiff could not recover even if $30,000 was more than the assets were worth. To this charge so far as it was inconsistent with the ruling requested the defendant excepted.

The judge in the course of his charge told the jury that "if you find that the plaintiff has not made out his case on the first and second counts, you will reach this third count, which we have just been considering, and if you find that the plaintiff prevails, if your conclusion is that the case is made out upon the first and second counts, you do not have to consider the third count; but if the plaintiff fails in the first and second counts, the misrepresentation counts, then you come to consider the third count. If he established his case, in your judgment, on the basis that I have laid down as essential, then you find for the plaintiff for the amount of the mistake, if computation was the basis, and you specify in your verdict that it is on the third count, and if we find that you report your verdict on the third count, by your silence on the other counts, we shall infer that your verdict is favorable to the defendant on the first and second counts."

The jury returned a verdict for $7,506.32 on the third count, with interest from December 22, 1900.

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1. The demurrer was rightly overruled. The defendant's argument in support of his demurrer is that the contract of August 7 was an entirety; that it has not been rescinded, and that the third count is an effort to recover back one or more of the items which went to make up this $30,000. The basis for this argument lies in the contention that by the allegation that the third count is for the same cause of action as the first and second counts the plaintiff alleges that the cause of action sued on in the third count grows out of the written contract of August 7, 1896, a copy of which is annexed to the second count and referred to therein. But this contention is altogether groundless.

The purpose of inserting in one declaration several counts for the same cause of action is to state the plaintiff's claim in as many ways as the pleader thinks wise in view of the fact that he is not certain just what the case will be when made out by proof at the trial. Each count purports to state a separate cause of action, whether it is inserted for the same or for different causes of action, and therefore the allegations of one count are not to be imported into another count unless that is done in terms. For all we can know the only purpose of inserting the third count in this declaration was to provide for the contingency of the written contract of August 7 not being made out by proof and the oral contract testified to by the plaintiff and found by the auditor being proved. Had that been the result of the evidence the plaintiff could have recovered the sums found due by the auditor and the third count would have been the proper declaration for a plaintiff to file who had that case.

2. The ruling asked for should have been given, and the instructions to the jury which were excepted to were wrong.

When the plaintiff and the defendant on August 7 reduced to writing the agreement which they finally reached as the result of the previous negotiations, that writing superseded all the previous negotiations and oral agreements, if any, and became the statement of the trade ultimately made.

If the plaintiff was induced to enter into this written agreement by false and fraudulent representations on the part of the defendant as to the statement having been made by Nilsson and being correct, his remedy, or one of his remedies, was to recover

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damages for having been induced to supersede the previous negotiations and oral agreements by the written contract; in other words, to bring the action set forth in the second count.

But if there was a mistake in the figures set forth in that statement but no false and fraudulent representation, the plaintiff's only remedy was to have the written contract set aside in equity on the ground of mistake. He has no remedy at law. Until that contract is set aside on the ground of mistake it contains within its four corners the statement and the only statement of the obligations ultimately entered into by the plaintiff and the defendant.

The plaintiff has sought to escape from this conclusion, by invoking the rule that the consideration stated in a deed (*Cardinal* v. *Hadley*, 158 Mass. 352) is not conclusive. But that rule is not applicable here. The reason why the statement of the consideration in a deed is not conclusive is because it is not the purpose of a deed to set forth the agreement of the parties as to the price paid for the thing conveyed. The statement in a deed of the consideration for the conveyance thereby made is a reference to a fact, not the statement of a contract. So far as a deed states the terms of the conveyance it is as binding as any other written contract. *Edison Electric Illuminating Co.* v. *Gibby Foundry Co.*, *ante*, 258.

What the defendants set up here is that by the written contract of purchase and sale the price to be paid was $30,000 and not such sum as Nilsson should find to be due on the basis of the settlement of June 26, allowing for subsequent transactions. A party to a written contract can no more contradict that contract as to the price to be paid than he can contradict it as to the thing sold. The rule that the consideration in a deed is not conclusive throws the parties back on the contract in pursuance of which the deed was given. In the case at bar the written agreement of August 7 was and is that contract.

The defendant's next contention is that the written contract of August 7 was a transfer or bill of sale of the business made in pursuance of the previous oral agreement of August 5. But that contention is contradicted by the terms of the written instrument of August 7, which purports to be an agreement and not a transfer; it in terms makes the provision: "Papers to

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pass and payment of the thirty thousand dollars in cash or satisfactory securities to be made within two months from date." More than that the written transfer in the form of an indenture dated August 21, 1896, made in pursuance of this agreement was introduced in evidence.

We have examined all the cases cited by the plaintiff. They go no further than to support his right to recover in the absence of the written agreement of August 7, which, as we have said, he could have done on the findings made by the auditor.

3. The defendant has asked us to limit the new trial to a trial on the third count. He bases this contention on the fact that the judge instructed the jury that "if the plaintiff fails in the first and second counts," they were to consider the third count, and "if we find that you report your verdict on the third count, by your silence on the other counts, we shall infer that your verdict is favorable to the defendant on the first and second counts."

The return of a verdict on the third count under this charge well might have been ground for a motion to have the jury asked by the judge whether they had found for the defendant on the first and second counts, and if they said that they had, to have them amend their verdict and render one for the defendant on those two counts. But this was not done. No verdict has been rendered on those counts. For all we know no verdict was rendered on the first and second counts because the jury did not agree on those counts.

Exception to order overruling demurrer overruled; exception to charge to jury sustained.

S. C. Darling, for the defendant.

G. L. Mayberry, (*L. K. Morse* with him,) for the plaintiff.

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PIERRE N. BRUNELLE *vs.* LOWELL ELECTRIC LIGHT CORPORATION.

Middlesex. January 11, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Municipal Corporations, By-laws and ordinances. *Evidence*, Materiality, Opinion. *Negligence*. *Electricity*.

The question, whether the violation of a city ordinance in regard to the installation of wires by failing to notify the inspector of wires of an intended extension of electric light wires in a building and to obtain a permit for such extension contributed to an accident caused by a shock of electricity from the wire of such extension, if there is evidence on the subject, is a question of fact to leave to a jury.

Upon the question whether injuries from a shock of electricity received from an electric light wire in a building were caused by the violation of a city ordinance in failing to notify the inspector of wires before installing the wire or to obtain a permit for doing so, it is not permissible to show that the inspector of wires in such cases allowed the ordinance to be violated by not requiring notice or that when he received such a notice he neglected to perform his duty of inspection.

In an action against an electric light corporation for personal injuries from a shock of electricity received from a portable electric light attached to a wire which the plaintiff had installed in his cellar as an extension from the wires in his shop above in violation of a city ordinance which required him to notify the inspector of wires of the intended extension before beginning work on it and to obtain a permit for its installation, both of which he failed to do, it is error for the presiding judge to permit the inspector of wires to testify that in a case like this, where wires already were installed and an extension was to be made, it was not his practice to require an application to be made or a permit to be obtained before the current was turned on, that when he received a notice in such a case, if he thought there was no question about the contractor or about the premises, he did not go to examine the premises but relied on the notice, and that in the present case he knew the contractor employed by the plaintiff and that he stood well in his business; and it is further error for the judge to instruct the jury that in determining whether the plaintiff was negligent in not obtaining a permit they might consider the practice of the inspector not to grant permits, and that in determining whether the plaintiff's violation of the ordinance contributed to the happening of the accident they might consider whether the inspector if he had received the proper notice would have inspected this wire.

The inspector of wires of a city, appointed under an ordinance of the city establishing an inspection of wires department, cannot be allowed to testify to his opinion that it is not the duty of any person other than himself to enforce the provisions of the ordinance, the construction of the ordinance being a question of law.

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TORT by the proprietor of an apothecary shop on East Merrimack Street in Lowell against a corporation maintaining an electric light plant in Lowell and furnishing electricity for light, heat and power, for personal injuries from a shock of electricity received when taking hold of a portable cord to carry an electric lamp to a part of the cellar under the plaintiff's shop. Writ dated December 7, 1903.

At the first trial of the case in the Superior Court before *Wait*, J. the jury returned a verdict for the plaintiff in the sum of $4,995, and exceptions taken by the defendant were sustained by this court in a decision reported in 188 Mass. 493. There was a new trial before *Stevens*, J. It appeared that the plaintiff employed one Hinckley to make an extension of the wiring in his shop to carry it into the cellar, where an electric lamp was attached to the end of a flexible cord which when not in use was kept suspended upon a hook. It was admitted that the wiring was not installed in accordance with the terms of an ordinance of the city of Lowell approved on July 26, 1899, establishing an inspection of wires department. That ordinance contained, among others, the following provisions:

"Section 9: In no case shall a current of electricity be connected to any system of wiring or apparatus intended to be used for power or lighting without permission being first obtained and a written permit granted by the inspector of wires; the jurisdiction of the inspector is intended to include all public and private electrical systems that are now and may hereafter be installed in the city of Lowell. . . .

"Section 10: No person or corporation shall change the position or make additions to any wiring system or install any new work or electrical apparatus without first notifying the inspector and he given full opportunity to inspect the same before such work is completed, and when any electric wires designed to carry an electric current or power current are to be concealed the inspector must be notified before work is commenced, and he shall give his permission and approval for all such work and connections immediately unless in his judgment such apparatus or wiring endangers life or property or is not in accordance with the laws and ordinances or in conformity with the established insurance rules.

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"Section 11: The inspector shall require that the established Rules and Regulations of the National Board of Fire Underwriters shall be complied with both for outside and interior construction."

"Section 14: Whoever violates or fails to comply with any of the provisions of this ordinance after being duly notified in writing by the inspector shall forfeit and pay for each offence not less than ten nor more than twenty dollars."

The inspector of wires of the city of Lowell was called as a witness by the plaintiff, and, subject to the objection and exception of the defendant, gave the testimony as to his practice under this ordinance and as to his exclusive duty to enforce it which is stated in substance in the opinion.

At the close of the evidence the defendant asked the judge to make certain rulings, twenty in number. Some of these rulings the judge made either wholly or in a modified form in instructions given to the jury. The others he refused, but the questions raised by their refusal have been made immaterial by the decision of this court sustaining the exceptions to the admission in evidence of the testimony of the inspector of wires and the instructions of the judge in regard to it.

The judge submitted to the jury two questions in writing as follows:

1. Did the violation of the city ordinance by the plaintiff contribute toward the accident?

2. Did the failure of the plaintiff to notify the inspector of the extension of the wires before the work was commenced and to obtain a permit, in accordance with the city ordinance contribute toward the accident?

To both questions the jury answered "No." They returned a verdict for the plaintiff in the sum of $5,500.

The defendant filed a motion in writing that the verdict be set aside, and that the special findings of the jury on the two questions submitted to them be not received by the court, because they involved and called for the finding of the jury upon questions of law, and because they were contrary to and not supported by the evidence in the case. The judge denied the motion.

To this denial, as well as to the admission of evidence, the

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rulings and the refusal of rulings above mentioned, the defendant alleged exceptions.

W. H. Bent, for the defendant.

J. J. Hogan, for the plaintiff.

SHELDON, J. In our opinion, upon the special findings made by the jury, the plaintiff would be entitled to retain his verdict if there was no error in the admission of evidence or in the instructions upon which those findings were made. But we are of opinion that there was such error.

There was, to say the least, evidence upon which the jury might have found that the plaintiff, in putting into his cellar the wire and appliances for a portable light, violated §§ 9, 10 and 11 of the ordinances of the city of Lowell, in that he failed to notify the inspector of wires of the intended extension before the work was begun and did not obtain a permit for such extension, and did not comply, in making the extension, with the rules and regulations of the national board of fire underwriters; and that this conduct of the plaintiff was the cause of the accident which happened. In view of the penalty imposed by § 14 of the ordinance, the presiding judge rightly ruled that the plaintiff could not recover if he had thus acted in violation of the ordinance and such violation had contributed to the accident. *Brunelle* v. *Lowell Electric Light Corp.* 188 Mass. 493. But as bearing upon the latter question he permitted the inspector of wires, against the exception of the defendant, to testify that in a case like this, where wires were already installed and there was simply an extension made, it was not his practice to require an application to be made and a written permit obtained before the current was turned on, but to make such requirement only where there was a new installation; that in the majority of cases where the work was exposed, he did not go to examine the premises, but relied on his notice; that if he thought there was any question about the contractor or the premises he would make it his business to get there; that he knew Hinckley, the contractor who did this work, and that he stood well in his business. He further testified at considerable length to the same effect. That this evidence was introduced to excuse the plaintiff for not having seasonably made application and secured a permit from the inspector is shown by the fact that the

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judge in his charge called the attention of the jury to the testimony, and instructed them that in determining whether the plaintiff was negligent in not having obtained a permit, they might consider the practice of the inspector at that time not to grant permits, if they so found; and also allowed them, in passing upon the question whether the plaintiff's violation of the ordinance contributed to the happening of the accident, to consider whether the inspector, if he had received the proper notice, would have inspected these wires, fuses and apparatus, and have required them to conform to the standard of the rules and regulations of the national board of fire underwriters. In our opinion this was erroneous, and was prejudicial to the defendant; for the special findings of the jury may have rested entirely upon this testimony of the inspector of wires.

The practice which the inspector testified that he had adopted was certainly contrary to the terms of the ordinance, and was unlawful. The jury should not have been allowed to speculate upon the question whether the inspector, if he had received proper notice from the plaintiff, would have neglected to perform his duty. This was wholly an immaterial question. *Jones* v. *Holden*, 182 Mass. 384. *Pickering* v. *Weld*, 159 Mass. 522. *Abbott* v. *North Andover*, 145 Mass. 484. *Commonwealth* v. *Perry*, 139 Mass. 198. *Cutter* v. *Howe*, 122 Mass. 541. The recognized principle that in dealing with ancient instruments and transactions, where doubtful words are used, where the purpose and intent are obscurely expressed, the acts and conduct of the parties, immediately following, are to be regarded as the best expositors of the meaning intended, (*Cambridge* v. *Lexington*, 17 Pick. 222, 230,) is inapplicable here. And see further *Geyser-Marion Gold-Mining Co.* v. *Stark*, 106 Fed. Rep. 558; *Consolidated Coal & Mining Co.* v. *Floyd*, 25 L. R. A. 848.

The testimony of the inspector of wires to his opinion that it was not the duty of any person other than himself to enforce in the city of Lowell the provisions of the ordinance which has been mentioned, ought not to have been received. It was for the court and not for the witness to construe the ordinance.

As the other questions raised upon the bill of exceptions are

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not likely to be presented in the same form at another trial, we do not deem it necessary to consider them in detail. We have not found any errors beyond those stated which would appear to be sufficient to warrant us in setting aside the verdict.

Exceptions sustained.

MARY A. McCAFFERTY *vs.* LEWANDO'S FRENCH DYEING AND CLEANSING COMPANY.

Suffolk. January 11, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability. *Evidence*, Materiality. *Practice, Civil*, Exceptions.

A workman entering the employment of another person assumes all the obvious risks of that employment whether he knows of them or not. It is for him to determine whether he will make an examination of his place of employment before going to work or will take his chances.

A circular tank about five feet in diameter was placed in a square hole in the floor of a room forty feet by thirty or thirty-five feet where girls were employed to mend curtains. The bottom of the tank was about four feet below the floor and its top about five feet above the floor. There was an open space of about eighteen inches between one of the corners of the hole and the round surface of the tank. The employees were in the habit of getting water to drink from a pipe which ran into the tank. A girl on the first day of her employment, a little more than four hours after she had been put to work, felt thirsty and, having seen two other girls go to this pipe for water, went with two fellow employees to get a drink there. When she was stepping aside to make it convenient for one of her fellow employees who had taken the first drink to pass her, she fell into the hole and was injured. She did not see the hole because she did not look at the floor, but the hole would have been seen by any one who was looking on the floor. In an action against her employer for the injuries thus caused it was *held* that she could not recover, the risk being an obvious one which she assumed in going to work at that place.

In an action by an employee against his employer for an injury on the first day of the plaintiff's employment caused by his stepping into a hole in the floor of the room in which he was put to work, it is proper to exclude a question by the plaintiff to the foreman in charge of the defendant's building, whom he has called as a witness, asking him whether before the day on which the plaintiff was employed the opening was covered in any way.

The exclusion of a competent question is no ground for exception if the fact sought to be established by the answer to the question afterwards is proved and is assumed in dealing with the case.

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In an action by an employee against his employer for an injury from an alleged defect in the ways, works or machinery of the defendant there is no difference, except in the amount to be recovered, between the liability under R. L. c. 106, § 71, cl. 1, and at common law, so that the exclusion by the presiding judge of evidence offered by the plaintiff of notice under § 75 of the statute can do the plaintiff no harm even if the notice offered was a good one.

LORING, J. The plaintiff was employed by the defendant at one o'clock in the afternoon on the eighteenth day of May, 1903, and between five and six o'clock of the same day she met with the accident here complained of.

She was set to work with other girls mending curtains, in a room some forty feet by thirty or thirty-five feet. Towards five o'clock she felt thirsty, and having seen two other girls get a drink of water from a tank, or a pipe running into a tank, she went with two fellow employees to get a drink herself and fell into a hole between the tank and the floor. The tank was nine feet in height and five feet in diameter. It was (as we understand the bill of exceptions) the section of a cylinder set on end. The bottom of the tank was "set into a space 3½ to 4 feet" below the floor in question. The top was therefore some five feet above the level of the floor. The hole in which this round tank was set was a square one, and there was a space of about eighteen inches between the corner of the square hole and the round side of the tank. The employees were in the habit of getting water to drink as it ran from the pipe into the tank, the water in the tank not being fit to drink. Mrs. Daley, who with Miss Conley was with the plaintiff (according to her testimony), first took a drink. Miss Conley asked the plaintiff if she wanted a drink; she said she did, and stepping to one side to make it convenient for Miss Conley she fell into the hole.

The plaintiff testified that she did not see the hole but was looking up and not on the floor. Although the evidence was overwhelming that the place in question was well lighted, there was some evidence that it was not. All the witnesses however testified that the hole would be seen by any one looking on the floor. On this evidence the presiding judge directed a verdict for the defendant. There were some questions of evidence which we shall state later on.

We are of opinion that the judge was right.

When the owner of real or personal property wishes to sell it,

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he does not have to make it a good thing of its kind but can sell it as it is for what it is worth.

Again, when an owner lets property to another in place of selling it, he is under no obligation to put it in repair or make it better, but can let it as it is.

The same principle applies when an employer hires a person to work in his factory. He is under no obligation to make the factory a better one or change it in any other way. The employee takes it as it is. Or, as it usually is said, he assumes all obvious risks. Whether the employee in fact does or does not know of the risk is not the question and is not material. He assumes all obvious risks, even though they be unusual ones, (*McLeod* v. *New York, New Haven, & Hartford Railroad*, 191 Mass. 389,) and it is for him to determine whether he will make an examination before going to work or will go to work without making an examination and take his chances. *Rooney* v. *Sewall & Day Cordage Co.* 161 Mass. 153, 159.

It is only in case the risk is not an obvious one that any duty is thrown on the employer, and the duty thrown on him in such a case is to give a warning.

On the uncontradicted testimony the hole in question in the case at bar would have been seen by any one who was looking on the floor. The case is very like *Hoard* v. *Blackstone Manuf. Co.* 177 Mass. 69; *Nealand* v. *Lynn & Boston Railroad*, 173 Mass. 42; *Kleinest* v. *Kunhardt*, 160 Mass. 230.

The difference between the case at bar and the cases of *Falardeau* v. *Hoar*, 192 Mass. 263, and *Hogarth* v. *Pocasset Manuf. Co.* 167 Mass. 225, relied on by the plaintiff, is plain. It is one thing to open a trap door and leave it unguarded, and another to maintain a hole all the time which is obvious to any one who looks on the floor in which the hole is. In *Gustafsen* v. *Washburn & Moen Manuf. Co.* 153 Mass. 468, a ditch was dug subsequently so as to make it dangerous to use the track in question as it was used when the plaintiff entered the employment of the defendant.

The questions of evidence remain.

It was immaterial whether the hole had been covered over previously or not. The question to be tried was whether it was in the same condition at the time of the accident that it was in

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when the plaintiff was employed at one o'clock on the same day, and whether the condition was an obvious one. The question asked Bailey was rightly excluded.*

The plaintiff was not injured by the refusal of the judge to allow the plaintiff to ask the superintendent whether the employees were in the habit of drinking at the tank in question. That was proved afterwards, and we have assumed it to be the fact in dealing with the plaintiff's case.

So far as defects in the ways, works and machinery are concerned, there is no difference between the liability under the employers' liability act (R. L. c. 106, § 71, cl. 1) and at common law, except in the amount which can be recovered. *Lynch* v. *Stevens & Sons Co.* 187 Mass. 397. For this reason the plaintiff was not harmed by the exclusion of her notice, if it was a good one.

Exceptions overruled.

J. H. Vahey, (*P. Mansfield* with him,) for the plaintiff.

W. H. Hitchcock, for the defendant.

BESSIE ROSE *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

Middlesex. January 14, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence. Street Railway.

In an action against a street railway company by a woman passenger for personal injuries incurred while alighting from a car of the defendant, after being told by the conductor to change to another car, by stepping on some yielding earth at a place where repairs were being made and spraining her ankle, if it appears that the accident occurred in a public highway where the repairs which required the change of cars and occasioned the presence of the soft earth

* Bailey was the foreman of the defendant's cleansing house in which the plaintiff was employed, and was called by the plaintiff as a witness. The question excluded was whether before May 18, 1903, the opening was covered in any way.

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were being made by a railway company other than the defendant, over whose track the defendant operated its cars in that highway under an agreement which gave it no control of the track or repairs thereon, and if there is nothing to show that the conductor or the defendant or its agents knew or should have known that the ground on which the plaintiff stepped was likely to yield, and the plaintiff herself testifies that it appeared to her "as though everything was all right," that it "was kind of gravelly down there" and "looked level with the road," there is no evidence for the jury of negligence on the part of the defendant in selecting a place for the plaintiff to alight.

TORT for personal injuries incurred while alighting from a car of the defendant on September 20, 1904, at Winthrop Square in Medford. Writ dated March 9, 1905.

At the trial in the Superior Court before *Aiken*, C. J. the plaintiff testified that she lived in Malden and on the day of the accident took an open car of the defendant at Medford Square in that city to go to Lowell; that when the car arrived at Winthrop Square the conductor said, "Forward car for Lowell" or "Car for Lowell"; and that thereupon the plaintiff prepared to alight from the car. What happened then the plaintiff described as follows:

"I took my little package and went to the right-hand side of the car, and putting my hand carefully on to the handle-bar, which I call it, and lowering my right foot on to the running-board, and then my left, and looking down I saw that some repairs had been done, but it looked and appeared to me as though everything was all right. I knew that the running-board was high, and knowing so, I took a careful step down, and supposed that everything was all right; and I lowered my left foot to the ground, and found there was a little distance from where I had to go, so I let go gently down and as I did so my bearing on to the ground sunk in, something rolled and give and turned my ankle over and threw me to the ground."

On cross-examination the plaintiff testified "I did not see that the car track was dug up. I knew they had been doing some repairs. The road had been filled in again and it looked as though it was all right to me. I did not look — well I did not see but what it was a good road. It looked all right to me when I lowered my foot down. It was kind of gravelly down there. It looked all right as I put my foot down. It looked level with the road. I did not see that the earth was loose. I

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saw that there had been some repairs, but I cannot say that it was loose."

It was agreed that the car from which the plaintiff alighted was a car owned, controlled and operated by the defendant. It also was agreed that the tracks at the place of the accident were owned by the West End Street Railway Company, a corporation in no way controlled by or managed by the defendant; and that the repairs on the street, referred to in the testimony, were made by the Boston Elevated Railway Company, the lessee of the West End Street Railway Company, in consequence of the change from a single track to a double track location. The cars of the defendant were run over these tracks under an agreement with the West End Street Railway Company.

The Chief Justice ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. Bennett, (*H. Bergson* with him,) for the plaintiff.

E. P. Saltonstall, (*S. H. E. Freund* with him,) for the defendant.

MORTON, J. We assume in favor of the plaintiff that the evidence would warrant a finding that she was in the exercise of due care, that she did not cease to be a passenger in alighting in accordance with the conductor's directions to take another car for the purpose of being transported to her destination, and that, under the circumstances, the conductor was bound to exercise due care in selecting a place for her to alight and make the change. But we see no evidence that the conductor failed to exercise due care in selecting a place for her to alight. The change from one car to another was not rendered necessary by anything which the defendant had done or omitted to do. The repairs which rendered it necessary to make the change were being made by the Boston Elevated Railway Company, as lessee of the West End Street Railway Company, which owned the track and the defendant had nothing to do with them, and the place of the accident was a public highway. The case differs therefore, in essential particulars, from the case of *Joslyn* v. *Milford, Holliston & Framingham Street Railway*, 184 Mass. 65, relied on by the plaintiff. The plaintiff contends that the place where she was invited to alight was not a suitable place because of the yielding nature of the ground on which she stepped as she

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got off the car, and which she contends caused the injury complained of. But there is nothing to show that the conductor or the defendant or its agents knew or in the exercise of proper care should have known that the ground where the plaintiff stepped down from the car was liable to yield. The plaintiff testified on direct examination that it appeared to her "as though everything was all right," and on cross-examination that "It was kind of gravelly down there. It looked all right as I put my foot down. It looked level with the road." The repairs were not made by the defendant as in *Joslyn* v. *Milford, Holliston & Framingham Street Railway*, *ubi supra*, and there is nothing to show, we think, that the conductor was not justified in assuming as the plaintiff did that the road was "all right."

Exceptions overruled.

SAMUEL R. GORDON *vs.* MAX LEVINE.

Suffolk. January 14, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Bills and Notes.

Where the drawer, the drawee and the payee of a check are all in the same city or town, the check should be presented for payment before the close of banking hours on the day after its delivery, and its circulation from hand to hand by indorsement does not extend the time for its presentment.

The dictum in *Taylor* v. *Wilson*, 11 Met. 44, 52, that a check may "be passed from hand to hand, and a reasonable time is allowed to each party receiving the same to present it for payment," is to be understood as referring only to the facts of that case where the check was sent to the payee in a city in another State and was forwarded for presentment in the usual course of business.

If a check on a bank in a city is drawn and delivered in that city on Saturday and is not presented for payment until the following Friday, when the bank on which it is drawn has failed and closed its doors, the drawer of the check is discharged from liability to the payee to the extent of any loss that he has suffered from the failure to present the check for payment before the close of banking hours on Monday.

MORTON, J. This is an action upon a check by the plaintiff as payee against the defendant as drawer. The check was dated

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December 30, 1905, which was Saturday, though there was some question whether it was actually drawn and delivered on that day or the 31st. The plaintiff is described in the writ as of Chelsea and the defendant as of Boston. The bank on which the check was drawn was in Boston and the check was drawn and delivered there. The plaintiff testified that the defendant asked him not to present the check for a couple of days as he did not have sufficient funds to meet it, but that he presented it Monday morning, January 1, and was told there were no funds. and that he went to see the defendant at his place of business but did not see him. The plaintiff also testified that in the afternoon of the same day he passed the check to one Saievitz in payment of a bill which he owed him, receiving the balance in cash. And there was testimony tending to show that on the next day Saievitz indorsed it to one Rootstein, who deposited it on January 4 in the Faneuil Hall National Bank in Boston for collection, and that that bank's messenger went with it on the afternoon of the following day, Friday, January 5, to the bank on which it was drawn, the Provident Securities and Banking Company, and found its doors closed. The plaintiff also testified that he told the defendant that the bank had failed, and that the defendant promised to make the check good. The defendant denied this, and also the plaintiff's statement that he had asked the plaintiff not to present the check for a couple of days, and introduced testimony tending to show that at the time when the check was drawn he had sufficient funds on deposit at the bank to meet it, and continued to have down to the failure of the bank. It was admitted that the bank failed on Friday, January 5, and the defendant introduced evidence tending to show that he had received no payment or dividend on account of his deposit. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge to give certain instructions that were requested, and to the admission of certain testimony.

The defendant, in substance, asked the judge to instruct the jury that a check must be presented for payment in a reasonable time, and that, in order to have been presented within a reasonable time, the check in suit should have been presented before the close of banking hours on Monday; that its transfer to successive

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holders would not extend the time for presentment, and a presentment on January 5 would not be within a reasonable time, and if the bank failed in the meantime and the defendant sustained a loss in consequence of delay in presenting the check, he would be discharged from liability to that extent. The judge gave in part the instruction thus requested, and refused it in part. He instructed the jury that the check must have been presented for payment within a reasonable time, and that if it was presented on Monday that would be within a reasonable time. But he refused to instruct the jury that the transfer to successive holders would not extend the time, or that a presentment on Friday was not within a reasonable time. On the contrary he instructed them that "the court had occasion to consider that in one case in this Commonwealth (referring, we assume, to *Taylor* v. *Wilson*, 11 Met. 44), and it is there stated that a check may also be passed from hand to hand, and a reasonable time is allowed to each party receiving the same to present it for payment." And after calling their attention to the provision of the statute (R. L. c. 73, § 209) that in considering what a reasonable time is "regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case," left it to them to determine whether the check was presented on Monday, or, if they were not satisfied that it was, then to determine whether if it passed from hand to hand and each one had a reasonable time to present it the presentment on Friday was within a reasonable time. For aught that appears the jury may not have been satisfied that the check was presented on Monday and may have found for the plaintiff on the ground that the presentment on Friday was within a reasonable time. The question is therefore distinctly raised whether a presentment on Friday could have been found to be within a reasonable time.

The general rule is as was stated by the judge and as is provided in the negotiable instruments act (R. L. c. 73, § 203) that a check must be presented for payment within a reasonable time after it is issued. If it is not so presented, and the drawer sustains a loss by reason of the failure of the drawee, he will be discharged from liability to the extent of such loss, continuing liable otherwise. This results from the nature of the instru-

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ment which though defined in the negotiable instruments act (R. L. c. 73, § 202) as "a bill of exchange drawn on a bank payable on demand" is intended for immediate use (*Mussey* v. *Eagle Bank*, 9 Met. 306, 314), and not to circulate as a promissory note, and it consequently would be unjust to subject the drawer to the loss if any resulting from failure to present it for payment within a reasonable time. What is a reasonable time, however, still remains for consideration. The negotiable instruments act provides generally (R. L. c. 73, § 209), as the judge said, that "In determining what is a 'reasonable time' or an 'unreasonable time' regard is to be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instruments, and the facts of the particular case." This, however, would not seem to lay down or to establish any new rule. The nature of the instrument and the facts of the particular case have always been considered in passing upon the question of reasonable or unreasonable time. In deciding, therefore, whether this check was presented within a reasonable time, if presented on Friday, resort must be had to the rules which have been hitherto established in similar cases. And one of the rules which has been established is, that where the drawer and drawee and the payee are all in the same city or town, a check, to be presented within a reasonable time, should be presented at some time before the close of banking hours on the day after it is issued, and that its circulation from hand to hand will not extend the time of presentment to the detriment of the drawer. If it is presented and paid afterwards the drawer suffers no harm. But if not presented within the time thus fixed, and there is a loss it falls not on him but on the holder. *Watt* v. *Gans*, 114 Ala. 264. *Simpson* v. *Pacific Ins. Co.* 44 Cal. 139. *Bickford* v. *First National Bank of Chicago*, 42 Ill. 238, 244. *Northwestern Coal Co.* v. *Bowman*, 69 Iowa, 150. *Cawein* v. *Browinski*, 6 Bush, 457. *St. John* v. *Homans*, 8 Mo. 382. *Grange* v. *Reigh*, 93 Wis. 552. *Gregg* v. *Beane*, 69 Vt. 22, 26. *Woodruff* v. *Plant*, 41 Conn. 344. *Kirkpatrick* v. *Puryear*, 93 Tenn. 409. *Parker* v. *Reddick*, 65 Miss. 242, 246. *Mohawk Bank* v. *Broderick*, 10 Wend. 304; *S. C.* 13 Wend. 133. *Carroll* v. *Sweet*, 128 N. Y. 19. *Rickford* v. *Ridge*, 2 Camp. 537. *Williams* v. *Smith*, 2 B. & Ald. 496. 2 Danl. Neg. Instr. (5th ed.) § 1595. Byles, Bills (Sharswood's

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ed.) 80. Chit. Bills (12th Am. ed.) 387. Story, Prom. Notes, § 494. Bigelow, Bills & Notes, 78. Eaton & Gilbert, Commercial Paper, 632.

The case of *Taylor* v. *Wilson*, 11 Met. 44, relied on by the plaintiff, was a case where a check was drawn by one doing business in Charlestown and living in Roxbury on a bank in Charlestown in favor of a resident of Newport. The check was dated September 30, 1842, which was Friday, and was received by the payee Saturday evening, October 1. On Tuesday, October 4, having been previously cashed for the payee by a local bank, it was given by the cashier of that bank to a messenger to be carried to the Merchants' Bank at Providence in the usual course of remitting its funds and securities, and was received by that bank on Wednesday and sent by its cashier to the Suffolk Bank at Boston. That bank received it on the next day, October 6, and presented it on the same day to the bank on which it was drawn and payment was refused, — the bank having closed its doors on Monday morning, October 3, and being insolvent. The case was submitted to the court on agreed facts with power to draw inferences, and the court found in favor of the payee and against the drawer. The court held in effect that under the circumstances there had been no laches, and that the check had been presented within a reasonable time. There is a sentence in the opinion to the effect that a check may pass from hand to hand and that a reasonable time is allowed to each party receiving it to present it for payment, and the case has been cited to that point with approval in *Veazie Bank* v. *Winn*, 40 Maine, 60. But we do not think that the court meant to lay down the rule, that, under any and all circumstances, each party receiving a check from a previous holder was entitled to a reasonable time to present it for payment, or that the case required that it should lay down such a rule. On the contrary, the court expressly said that a party receiving a check was not guilty of laches if he did not present it on the same day on which it was drawn, but was allowed a reasonable time for that purpose, and that the next day was held to be such reasonable time. The decision should be limited to the case before the court which was that of a check drawn on a bank in one place and sent to a payee in another place at considerable distance and forwarded for presentment in

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the usual course of business, and, so understood and applied, was correct. It follows from what has been said that the exceptions must be sustained. The conclusion to which we have come on the principal question renders it unnecessary to consider the questions of evidence, though we may observe that we see no error in regard to them.

Exceptions sustained.

N. Barnett, for the defendant.
F. P. Garland, for the plaintiff.

GEORGE N. PIERCE COMPANY *vs.* JOSEPH E. CASLER & another.

Suffolk. January 14, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Bond. Deed. Specialty. Evidence, Presumptions and burden of proof. *Alteration of Instruments. Practice, Civil*, Exceptions.

Where one has delivered a bond or deed in which a seal stands opposite his signature he equally is bound by the instrument as a specialty whether he affixed the seal before or after signing or adopted a seal which had been affixed by another before he signed or authorized another to affix the seal after he signed.

Where the execution and delivery of a bond to dissolve an attachment and its approval by a magistrate constitute but one transaction, it does not matter whether the seals are placed upon the bond before or after its approval by the magistrate.

In an action on a bond given to dissolve an attachment, where the defence is set up that the bond was made void by a material alteration consisting of the affixing of seals by unauthorized persons after the bond had been delivered, whether the burden is on the defendant to prove this defence, the burden being on the plaintiff to prove the execution of the instrument on which he has declared by showing that the seals were affixed before delivery, *quaere*.

In a case which is before this court on exceptions the correctness of a ruling of the trial judge to which no exception was taken is not open for consideration.

CONTRACT against Joseph E. Casler and Rebecca E. Beers as sureties on a bond in the penal sum of $3,500, dated December

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5, 1898, given to dissolve an attachment in an action by the present plaintiff against Albert M. Beers, the principal in the bond. Writ dated March 8, 1906.

The answer of the defendant Beers contained a general denial, alleged want of consideration, and also alleged that each of the seals on the alleged bond was affixed after the signatures of the principal and the sureties and not by any of them or in the presence of or by the authority of any of them, that the instrument was materially altered after the signatures by the unauthorized and unlawful affixing of the seals, and that the bond was not approved properly by the magistrate.

In the Superior Court the case was tried before *Bell*, J. The plaintiff called Lynde Sullivan, Esquire, an attorney at law, who testified that Albert M. Beers employed him to prepare the bond, which he did, that he was present at the office of Major Jones, the magistrate, with the principal and the sureties, when the sureties were examined, that he thought the seals were duly affixed, and that after approval of the bond he took it at once to the office of the clerk of the Superior Court where he filed it. The plaintiff also called David A. Ellis, Esquire, an attorney at law, who testified that he was present at Major Jones's office in behalf of the George N. Pierce Company when the sureties were examined and that he had no doubt the seals were then duly affixed. Both Sullivan and Ellis admitted that they had no visual recollection of the seals. The defendants called Albert M. Beers, the principal, and the sureties, who each admitted signing the instrument, but denied that the seals were affixed before their signatures, or in the presence or by the authority of the sureties. The defendant Casler, however, admitted that he was not sure about the presence of the seals, but thought they were not upon the instrument.

The defendant Beers asked the judge to instruct the jury as follows:

1. If it appears that the seal of the defendant Beers was not affixed to the bond in suit by her or in her presence and at her request or with her assent, it cannot be presumed that it was afterwards affixed by her authority.

2. If the seal of the defendant Beers was affixed without her knowledge, authority or consent, and subsequently to her signa-

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ture, such affixing would be a material alteration of the bond, and she would not be bound thereby.

3. Except the same be under her seal the bond in suit would not be binding upon the defendant Beers and this for want of consideration.

4. If the bond in suit was not under the seals of the principal and the sureties at the time it was executed and before it was approved it was not an effectual bond as required by the statute, and was unavailing to release the attachment, and the plaintiff cannot recover against the defendants in this case.

5. If at the time the bond in suit was approved no seal had been properly affixed after the signature of the principal or any one of the sureties, then it was not such a bond as required by the statute and the plaintiff's affixing of the necessary seal or seals would not cure the defect, and the plaintiff cannot recover of the defendants in this action.

6. In order that the plaintiff should recover against the defendant Beers in this action it must appear that when the alleged bond in suit was delivered it had been properly sealed by the principal and by both of the sureties, and thus sealed before its approval by the magistrate.

The judge refused to make any of these rulings in the form requested, and gave other instructions, including the substance of some of the rulings requested, which are described in the opinion. The jury returned a verdict for the plaintiff in the sum of $2,225.38; and the defendants alleged exceptions.

F. H. Noyes, (*F. W. Peabody* with him,) for the defendants.

J. B. Studley, for the plaintiff.

SHELDON, J. The only questions raised by these exceptions arise upon the requests for instructions presented by the defendant Beers, and upon the specific objection to a part of the charge taken by both defendants. No other objection was made by either defendant to the instructions given.

The first and second requests of the defendant Beers appear to us to have been given in substance. The whole purport of the instructions was unmistakably to the effect that the plaintiff could not recover unless it appeared that before the bond was completed and delivered it had been fully executed by attaching the signatures and seals of the defendants while

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they were all present before the magistrate. If this was shown to have been done, if it was proved that each one of the defendants did sign the bond and did affix or cause to be affixed to it his or her seal, so that the bond was delivered by the defendants as a completed bond, this was sufficient; and it was not material, as the judge correctly stated, if the filling out and execution of the bond constituted one transaction, to determine the order in which the several steps were taken. The seal upon a bond or deed is none the less the seal of one who executes it whether he affixes it before or after his signature, or whether he adopts as his seal one which has been already affixed to the instrument by another, or is affixed to it at his request by another after the signature has been made. The material question is whether he has adopted it as his seal and delivered the writing as a sealed instrument; and manifestly this was the rule which was given to the jury.

The third request was also given in substance; for the judge expressly told the jury that the bond was "not a valid instrument unless there was a proper seal" upon it.

The fourth, fifth and sixth requests could not have been given in the language in which they were presented. Each one of these requests made it necessary to the validity of the bond that it should appear to have been sealed before its approval by the magistrate. But this was not necessary, if the whole matter of executing the bond, obtaining its approval by the magistrate and delivering it as a completed bond constituted but one transaction, to which the defendants were parties and which they carried to completion; for, as has been in substance already stated, the instrument had no effect until they delivered it, and they are bound by it in the character that it had when they delivered it. What its condition was at any previous stage of the transaction, whether signed or sealed or completed in any other respect, was wholly immaterial.

It has been argued however that the judge improperly ruled that the burden of proof was upon the defendants to prove that there were no seals upon the bond when delivered. He said to the jury, "That bond on the face of it is correct. It is attacked by the defendants. The presumption is, until it is shown to the contrary, that it is as it stands and is a correct

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bond. And the burden is upon the defendants, who attack this bond, to show that it is not properly sealed." But we do not think that this was intended, or was understood by the jury or by the defendants to be intended, as a statement that the burden was not upon the plaintiff to prove the due execution of the bond by proving that the defendants had both signed it and affixed their seals to it. If this were the meaning, it would be at variance with all the rest of the charge. The defendant Beers had set up the defence that this instrument had been "materially altered by the unauthorized and unlawful affixing of said seals, wherefore the defendant was discharged from all obligation thereunder." Her counsel apparently contended in the Superior Court, as they have argued here, that the seals were affixed by others after she had delivered the bond, and that this was a material alteration which wholly avoided the contract, so that for this reason, as well as for a lack of consideration, she could not be held upon the instrument as an unsealed agreement. In our opinion, the judge meant merely to say that if the defendants set up a material alteration by the affixing of seals to an unsealed instrument, the burden was upon them to make out their defence. There may be some question as to the correctness of this rule. *Graham* v. *Middleby*, 185 Mass. 349, 352, and cases there cited. *Simpson* v. *Davis*, 119 Mass. 269. See however the cases cited in 2 Cyc. 233, *et seq.* But the statement was not made with reference to any of the requests which had been presented; no exception was saved to it by either of the defendants; and it is not open to us to consider whether it was or was not correct.

For the reasons which have been already sufficiently stated, the exception taken to that part of the charge in which it was said substantially that if the whole matter of completing the bond by signing and sealing it, procuring its approval by the magistrate and delivering it constituted but one transaction, it would be sufficient if at the close of the whole transaction the bond had seals on and was a proper bond, cannot be sustained. There seems to have been no dispute that the defendants were present at that transaction; and the jury might well have found that they assented to all that was done there. In-

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deed, looking to the facts stated in the charge to the jury, (as we may do, *Botkin* v. *Miller*, 190 Mass. 411,) the jury would have been fully warranted in finding that the defendants attached their signatures after the seals had been affixed, and adopted these seals as theirs. At any rate, the question was for the jury; and we find no error in any of the rulings excepted to.

The verdict should have been for the penal sum of the bond; but no question has been made as to this.

Exceptions overruled.

MICHAEL MORAN, administrator, *vs.* CITY OF CHELSEA.

Suffolk. January 14, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability.

In an action against a city by a laborer employed by it in digging a trench for a sewer, for personal injuries from a stone falling upon him which some fellow workmen on the bank under the direction of a foreman were attempting to pull out of the trench, it appeared that previously the plaintiff had worked for ten years in a stone quarry where stones were hoisted, although his own work was drilling, that the plaintiff at the suggestion of the foreman, assisted by another workman, had fastened the rope around the stone, that the stone was two or three feet long and eighteen or twenty inches thick, weighing between three and four hundred pounds, that it was egg-shaped and its surface was smooth and slimy, that the plaintiff and his fellow workman in the trench were assisting in raising the stone by lifting and pushing, when the rope slipped and the stone fell on the plaintiff, causing the injuries. There was evidence that one of the men on the bank said that the rope was not going to hold, and that the foreman replied to him "You never mind the rope. You pull up the stone." There was nothing to show that this reply was heard by the plaintiff. *Held*, that the danger was an obvious one understood by the plaintiff and that by choosing to place himself underneath the stone, where if it slipped it would fall on him, he failed to exercise due care; *also*, that the reply of the foreman to the workman on the bank, although it might be evidence of negligence on the part of the defendant, furnished no excuse for the failure of the plaintiff to exercise due care.

MORTON, J. This is an action of tort to recover for injuries received by the plaintiff's intestate, one Woods, while employed

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by the defendant as a laborer in digging a trench for a sewer. In digging, Woods and another man uncovered a stone eighteen or twenty inches thick, and two or three feet long and pear or egg-shaped and weighing between three and four hundred pounds. "It was smooth and slimy." There was some talk between Woods and the foreman as to how it should be removed, and Woods suggested breaking it with a sledge, but the foreman said that he had none, and told some men to get a rope, which they did. Woods and the man with him fastened the rope round the stone and some men on the bank attempted to pull it out, Woods and his companion assisting by lifting and pushing, when the rope slipped and the stone fell on Woods causing the injuries complained of. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the judge to instruct the jury, amongst other things, to return a verdict for the defendant and to rule that the plaintiff was not in the exercise of due care, and that there was no evidence of negligence on the part of the defendant.

We think that a verdict should have been ordered for the defendant. The use of the rope to get out the stone with was not negligence on the part of the foreman. On the contrary the experts called by the plaintiff testified that it was proper, one of them going so far as to say that he had used the method of fastening which the testimony showed that Woods used. Woods was not directed to assist in lifting or raising the stone, but, assuming, as would naturally be the case, that he was expected to do so, the general danger was as apparent to him as to the foreman and therefore he needed no warning or instruction. He fastened on the rope himself and from his experience in the quarry * might well be supposed to be competent to do it. The slippery character of the surface of the stone and its peculiar shape were obvious, as was also the fact that if not properly fastened the rope might slip and the stone fall and injure whoever was beneath it. He was left to take such position as he saw fit in doing a work the general danger of which was apparent, and

* It appeared that the plaintiff previously had been employed for ten years in the work of quarrying stone, his work being to strike the drill and to blast, and that where he was working stones were loaded by fastening chains around them and hoisting them on the wagons with derricks.

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in which, as was observed in *Lodi* v. *Maloney*, 184 Mass. 240, the degree of the danger would vary with the position that was taken. He saw fit to place himself almost if not directly underneath the stone in a position where if the rope slipped and the stone fell he was liable to be injured, and we think that he must be held to have been wanting in due care, or to have assumed the risk.

Assuming that the remark made by the man on the bank that the rope was not going to hold and the reply of the foreman * furnished some evidence of negligence on the part of the latter, and therefore that the judge was right in refusing to rule that there was no evidence of negligence on the part of the defendant, there is nothing to show that the reply was heard by Woods or that the circumstances under which it was made furnished any excuse for the failure to exercise due care on his part. *Lodi* v. *Maloney*, *supra*. *Meehan* v. *Holyoke Street Railway*, 186 Mass. 511. *Tanner* v. *New York, New Haven, & Hartford Railroad*, 180 Mass. 572. *Fay* v. *Wilmarth*, 183 Mass. 71. *Gavin* v. *Fall River Automatic Telephone Co.* 185 Mass. 78. *La Belle* v. *Montague*, 174 Mass. 453. *Cunningham* v. *Lynn & Boston Street Railway*, 170 Mass. 298.

Exceptions sustained.

S. R. Cutler, (*H. W. James* with him,) for the defendant.

C. W. Bond, (*H. H. Bond* with him,) for the plaintiff.

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* The reply of the foreman was "You never mind the rope. You pull up the stone."

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ELLEN FARRELL, administratrix, *vs.* B. F. STURTEVANT COMPANY.

Suffolk. January 15, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability. *Practice, Civil*, Exceptions. *Evidence*, Materiality. *Statute*.

In an action against a building contractor for causing the death of the plaintiff's intestate while in the defendant's employ, it appeared that the foreman of the defendant ordered a carpenter employed by the defendant to move a gin pole or derrick, used for hoisting floor beams, from a building which had been finished to the third floor of another building in process of construction, that the plaintiff's intestate was one of a gang of six or seven men employed in moving this pole, that after giving the order to the carpenter the foreman went away, and the carpenter proceeded to move the pole and got it substantially in position upon the third floor where it was to be erected, that, when with the assistance of the plaintiff's intestate the carpenter was moving the foot of the pole a little, the foot slipped and pushed over the plaintiff's intestate who fell one or two stories, receiving the injuries from which he died. *Held*, that the jury would be warranted in finding that the carpenter had charge of moving and putting up the pole, not as a workman, but as a superintendent acting as such with the consent of the defendant in the absence of the foreman.

In an action against a building contractor for causing the death of the plaintiff's intestate while in the defendant's employ, it appeared that the intestate was one of a gang of six or seven men engaged, under the direction of a person who could have been found to be acting as a superintendent, in moving a gin pole or derrick to the third floor of a building in process of construction, that the pole was substantially in position in the place where it was to be erected, that the foot of the pole rested on some planks which had been placed upon the floor beams a short time before, probably by the plaintiff's intestate and the others, and the top of the pole rested against a roof timber, that the fall had been taken from the pole and fastened to a roof timber to hoist the pole up, and had to be fastened to the top of the pole again, that for this purpose it was necessary to slide out the foot of the pole a little, that the superintendent and the plaintiff's intestate were trying to do this and the superintendent directed the plaintiff's intestate "to steady it, steady the bottom of it so it would not slide," that, when in accordance with this direction the plaintiff's intestate started to "move the bottom out," the pole "simply slipped and pushed him out, pushed him over" and he fell one or two stories, receiving the injuries from which he died. The distance that the pole slipped was only "a couple of feet at the bottom." The plaintiff's intestate was an experienced carpenter and an active, intelligent and careful workman. *Held*, that, even if the plaintiff's intestate did not assume the risk of such an accident, there was no evidence that the accident was due to any negligence on the part of the superintendent.

The exclusion of a competent question gives no ground for exception if the fact sought to be established by the answer to the question sufficiently appears and

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this court holds that the evidence warranted a finding for the excepting party on the issue to which the fact pertained.

In an action against a building contractor for causing the death of the plaintiff's intestate while in the defendant's employ by his being pushed from the third floor of a building in process of construction by the slipping of the foot of a gin pole or derrick which he was adjusting under the direction of a superintendent, if there is nothing to show that the superintendent did not have all the ropes necessary to move the gin pole, general questions by the plaintiff relating to the supply of ropes for hoisting purposes properly may be excluded.

A violation of R. L. c. 104, § 44, requiring temporary floorings to be laid during the construction of an iron or steel framed building, is not evidence of negligence in an action against a contractor constructing such a building for causing the death of an employee by his being pushed from the third floor of such a building by the slipping of the foot of a gin pole or derrick as he was adjusting it and falling to and through the second floor of the building on which no close plank flooring had been laid, as the violation of the statute was not a cause contributing to the accident but only a condition under which it occurred.

MORTON, J. The defendant was engaged in erecting five buildings in Readville. It had as foreman a man named McNeil. McNeil directed one Scott, who was a carpenter, to move a gin pole or derrick from a building which they had finished to the third floor of another building. The gin pole was a stick of timber twenty-two to twenty-five feet long, four by six inches, and was to be used as a derrick for the purpose of hoisting up the floor beams. It had two guys on the back and one or two on the front to hold it in place, and a fall to be used for hoisting, and weighed all together between three and four hundred pounds. There were six or seven men, of whom the plaintiff's intestate was one, in the gang for moving the pole. After giving the direction McNeil went away and Scott proceeded to move the pole, and had got it on to the third floor and substantially into position, and, with the assistance of the plaintiff's intestate, was in the act of moving the foot a little, when the foot slipped and pushed the plaintiff's intestate over and he fell one or two stories, receiving injuries which resulted in his death. At the close of the plaintiff's evidence the judge directed a verdict for the defendant and the case is here on the plaintiff's exceptions.

We think that the jury would have been warranted in finding that Scott had charge of moving and putting up the pole, not as a workman, but as a superintendent or foreman in the absence of McNeil, with the authority or consent of the defendant. *Cashman* v. *Chase*, 156 Mass. 342. *Prendible* v. *Connecti-*

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cut River Manuf. Co. 160 Mass. 131. *McPhee* v. *Scully*, 163 Mass. 216. *Crowley* v. *Cutting*, 165 Mass. 436. *Knight* v. *Overman Wheel Co.* 174 Mass. 455. *Hilton* v. *Merrill*, 106 Mass. 528. *Smith* v. *Norris*, 120 Mass. 58. But we do not see how it can be said that the accident was due to any negligence on his part. It is immaterial whether he was accustomed to move gin poles or not. The pole had been moved to the third floor without accident and was substantially, as we understand the evidence, in the position in which it was required to be. What happened was this: The foot of the pole rested on some planks which had been placed across the floor beams a short time before, "probably," as the testimony tended to show, "by Farrell himself and the others," and the top rested against a roof timber. The fall had been taken off and fastened to a roof timber to hoist the pole up with and had to be fastened on to the top of the pole again. It was necessary to slide out the foot of the pole a little to do this. Scott and Farrell were trying to do that, and Scott directed Farrell "to steady it, steady the bottom of it so it wouldn't slide," and when Farrell started to "move the bottom out" as thus directed the pole "simply slipped and pushed him out, pushed him over." The distance that the pole slipped was short, "only . . . a couple of feet at the bottom." On this statement we do not see how, as already observed, Scott could be said to be at fault for what occurred, or how expert testimony would have helped to throw any light on the question whether he was negligent in undertaking to move the foot of the gin pole as he did. Moreover the intestate was forty-two years old and had always worked at his trade as a carpenter and was, as the testimony tended to show, "an active, intelligent man and a careful workman." The situation was as obvious and the danger, if any, of attempting to slide the foot of the gin pole along was as apparent to him, to say the least, as to Scott, and it may well be doubted whether he did not impliedly consent to the assumption of the risk.

No harm was done by the exclusion of the questions to the witness McNeil though they might properly have been admitted.* It sufficiently appeared at the close of the plaintiff's

* McNeil was called by the plaintiff, and the questions excluded were "What were Mr. Scott's duties in connection with this work which you told

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evidence what Scott's duties were in connection with the moving of the gin pole, and from whom the men in the gang took and were to take their orders, and, as already observed, the evidence warranted a finding that Scott was acting as foreman with the defendant's consent in the absence of McNeil.

There was nothing to show that Scott did not have all the ropes necessary to move the gin pole, and therefore the general questions relating to the supply of ropes for hoisting purposes were properly excluded.

While the failure of the defendant to comply with the provisions of R. L. c. 104, § 44,* constituted a violation of law and contributed to render the conditions under which the plaintiff's intestate worked upon the building more hazardous, it was not a cause contributing to the accident but a condition of it and therefore did not render the defendant liable. *Newcomb* v. *Boston Protective Department*, 146 Mass. 596.

The result is that the exceptions must be overruled.

So ordered.

A. Lincoln, for the plaintiff.

W. I. Badger, (*W. H. Hitchcock* with him,) for the defendant.

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him to do?" and From whom would the men in this gang, who were working on this work of getting up the pole, in the usual course of such work take their orders?"

* It appeared that the building was a steel frame building, three stories high, that the roof had been at least partially constructed, the roof timbers being laid, and that the carpenters on the day of the accident were engaged in putting in the floor timbers, none of the floors having been laid.

The plaintiff contended that the fact that the defendant acted in violation of law in failing to place and maintain a close plank flooring on the first and second floors before adding the third story to the building as required by R. L. c. 104, § 44, was evidence of negligence which contributed to the injuries sustained by Farrell and should have been submitted to the jury, that the object of the statute is to prevent a workman from falling through floors, and that it was for the jury to say how much the injuries and subsequent death of Farrell were caused or affected by his falling through the second floor.

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MARGARET J. HYNES *vs.* EDWARD W. BREWER, administrator.

Suffolk. January 15, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Nuisance. Ice and Snow. Easement, By prescription.

In an action by a woman for injuries from falling on ridges of ice on a highway caused by the freezing of water accumulated by a retaining wall and grading on land of the defendant alleged to be a nuisance, if it appears that the plaintiff was walking on a cross walk of a public highway at a reasonably slow pace, that she was looking ahead as she walked, that she had no reason to expect one side of the street to be more dangerous than the other and that she wore rubbers, and she testifies that on account of her physical condition at the time she was taking greater care than she otherwise would have done, the fact that she could see ice at the place where she fell as well as on other sidewalks in that vicinity is not conclusive against her, and she is entitled to go to the jury on the question of her due care.

A landowner has no right to maintain a retaining wall and a grading of his land which cause surface water to collect and to overflow upon a highway so as to create a nuisance by a dangerous accumulation of ice, and if he does so he is liable to a traveller on the highway who in the exercise of due care is injured by a fall caused by such accumulation.

If a landowner maintains a retaining wall and a grading of his land which cause surface water to collect and to overflow upon a sidewalk and a cross walk of a highway creating a dangerous accumulation of ice there, he is none the less liable for an injury caused by such nuisance because when he acquired the land the retaining wall and the grading already were upon it and both the wall and the surface of the ground have remained without change for fifty years.

A landowner cannot acquire by prescription a right to maintain a public nuisance.

TORT for personal injuries from falling on an icy cross walk near the premises of the defendant's intestate in Jamaica Plain on February 2, 1904. Writ dated April 5, 1904.

In the Superior Court the case was tried before *Aiken*, C. J. The following facts among others appeared at the trial.

The plaintiff fell on a cross walk on Green Street, a public highway, where it is intersected by a private way called Lamartine Square. The fee of Lamartine Square was in the defendant's intestate at the time the plaintiff fell. The premises in question had been in the possession of the defendant's intestate since 1844 and the defendant's intestate had lived on the premises for many years before February 2, 1904.

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The sidewalk on Green Street was lower than the premises of the intestate and there was a low retaining wall of rubble laid in mortar and water tight, extending along the entire front of the premises on Green Street and surmounted by a picket fence. At the corner of Lamartine Street the top of the wall was about a foot above the sidewalk on Green Street, and at Lamartine Square about a foot and a half above the sidewalk on Green Street. The general slope of Green Street is downward from Lamartine Street to Lamartine Square, there being a drop in that distance of three feet. The top of the wall was about six inches above the land inside it. The earth inside and immediately adjacent to the wall was a few inches higher than the surface ten feet inside the wall. Both Lamartine Street and Lamartine Square, as well as the surface of the premises in question, rise gradually from Green Street to the northeast on an average of five feet in one hundred, and there also is a general slope from the northwesterly corner of the premises to the southeasterly corner of the premises at the junction of Green Street and Lamartine Square.

The plaintiff in company with her sister had been to make a call on Chestnut Avenue, which leads off Green Street on the same side on which the intestate's premises were. In going to make this call she had proceeded along Green Street on the side opposite these premises. In returning she passed along the sidewalk on the side of Green Street adjacent to the premises in question. She described the accident as follows: "As I came along, just to Lamartime Square, I wasn't thinking of anything, looking straight ahead of me, when all of a sudden my left foot slipped forward, across me and I fell forward, over." She testified that it was at the crossing at Lamartine Square.

The evidence upon the issue of the plaintiff's due care, as well as upon the issue of the defendant's liability, is described in the opinion.

There was no evidence as to when or by whom the retaining wall was built, but it appeared that both the wall and the surface of the ground had remained without change for fifty years, and there was no evidence as to what the conditions were before that time. There was no evidence of the method em-

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ployed when the wall was constructed, or to show whether earth was at that time thrown up against the wall.

A civil engineer called by the defendant testified that in his opinion the land in its natural condition had been cut away, and the wall built for the double purpose of holding back the earth on the premises and affording a foundation support for the fence, that in its natural original state the lowest part of the valley was at a point within the wall and upon the intestate's estate. A civil engineer called by the plaintiff testified that in his opinion the lowest part of the valley in the natural, original state of the land was outside the wall at a point now Green Street.

At the close of the evidence the defendant asked the Chief Justice to make certain rulings which he refused. Most of these have become immaterial because the exceptions to their refusal were not argued. The seventh instruction asked for, the refusal of which is referred to in the opinion, was as follows:

"7. The owner or occupier of land is not liable for injuries to persons or property by reason of water flowing from his land in its natural condition, nor is he liable if by reason of such ordinary boundaries as picket fences or retaining walls made necessary by the lower grade of the adjacent street the surface water from his land escapes in larger volume at a given point than it would in the absence of such ordinary boundaries."

The Chief Justice in his charge to the jury, among other things, instructed them as follows:

"If, by the maintenance of the wall, or the grading of the ground, or by both causes in combination, an artificial channel was formed through which additional surface water flowed in a substantially greater quantity than it would otherwise flow, and the water was discharged upon the street by reason of such channel in substantially greater quantity than the natural drainage, and the quantity of ice was substantially increased thereby, on which the plaintiff fell, in the exercise of due care, then Mrs. Evans [the defendant's intestate] is responsible.

"There is no responsibility in this case unless you are satisfied that there was an artificial channel upon that portion of the premises in the vicinity of Green Street and that this artificial

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channel caused a substantial increase in the flow of water to the southeast corner of the Evans estate, and a substantial increase in the discharge upon the cross walk at the entrance to Lamartine Square and that this substantial increase in the flow and discharge contributed to cause the ice at that point upon which the plaintiff fell, and by contributed, I mean formed part of the ice upon which the plaintiff fell. If the plaintiff has made out these propositions that I have stated as necessary, viz. due care, in the first place, on her part; second, the existence of an artificial channel by which there was a substantial increase in the flow of the water, and a substantial increase in the discharge of the water at the cross walk, which substantial increase in the flow, and discharge of the water, contributed to cause the ice on which the plaintiff fell, then there is a right to recover, and you will assess damages on the principles I have laid down. Unless the two propositions that I have laid down as essential are made out, there is no right, and your verdict will be for the defendant."

The defendant alleged exceptions, of which those that were argued are mentioned in the first paragraph of the opinion. The portion of the charge excepted to included the paragraphs quoted above.

E. K. Arnold, for the defendant.

C. H. Donahue, for the plaintiff.

SHELDON, J. Although many other questions were raised by the defendant's exceptions, his counsel have insisted upon only three contentions: That on all the evidence the plaintiff was not entitled to recover; that the judge at the trial should have given the seventh instruction asked for; and that the judge erred in that part of the charge relating to the contribution of water from the defendant's premises to the formation of ice on the cross walk where the plaintiff fell. We will consider these points in their order.

1. The jury had a right to find that the plaintiff was in the exercise of due care. There was evidence that she was walking at a reasonably slow pace, in a place where she had a right to be. She was looking ahead as she walked. She had no reason to expect one side of the street to be more dangerous than the other. She wore rubbers. She testified that she was taking

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greater care by reason of her condition at that time. *Shipley* v. *Proctor*, 177 Mass. 498. The fact that she could see ice at this place as well as on other sidewalks in that vicinity cannot be conclusive against her. *Smith* v. *Lowell*, 6 Allen, 39. *Bennett* v. *Everett*, 191 Mass. 364.

The jury could find on the evidence that the effect of the defendant's intestate maintaining the retaining wall along Green Street in connection with the grading of her estate in that vicinity had been to alter materially the natural drainage of the land and to collect the surface water and that coming from rain and melted snow into an artificial pool, gathered and retained by the slope of her ground as graded and the water-tight structure of the wall, which, when sufficiently accumulated, would overflow in a considerable stream across the walk where the plaintiff fell; that this had happened shortly before the accident, and had resulted in a large accumulation of ice sloping from the junction of the fence and wall downward and outward to the street, this ice being about six inches thick at the thickest portion near the fence and wall, and being formed of ridges about a quarter of an inch thick, in successive layers. This would bring the case within the general rule that a landowner cannot, without being liable therefor, erect such buildings or structures upon his own land as will create a public nuisance in a highway. He has not the right to collect surface water into an artificial channel and thus to discharge it upon the highway. *Cavanagh* v. *Block*, 192 Mass. 68. *Shipley* v. *Proctor*, 177 Mass. 498. *Rathke* v. *Gardner*, 134 Mass. 14, 17. *Smith* v. *Faxon*, 156 Mass. 589. *Fitzpatrick* v. *Welch*, 174 Mass. 486.

Nor is it material here that this retaining wall was not built or the grading of the adjacent land done by the defendant's intestate. The liability is for maintaining the structures which bring about a public nuisance, and is the same whether she herself had them built, or received the property while they were standing upon it. *Leahan* v. *Cochran*, 178 Mass. 566. The fact that they have been maintained without change for fifty years gives no immunity. The right to maintain such a nuisance cannot be gained by prescription. Hammond, J. in *Leahan* v. *Cochran*, *ubi supra*, referring to *Holyoke* v. *Hadley Co.* 174 Mass. 424, 426, and *New Salem* v. *Eagle Mill Co.* 138 Mass. 8.

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Accordingly a verdict could not have been ordered for the defendant.

2. It follows from what has been said that the defendant's seventh request could not have been given. It ignored the rule that a landowner has not the right to collect surface water artificially into a definite channel and so to discharge it upon lower land to its injury, or upon a highway, in such manner as to create a public nuisance. It is not necessary further to discuss this point. See *Daley* v. *Watertown*, 192 Mass. 116.

3. The instructions complained of were carefully guarded, and sufficiently protected the defendant's rights. It plainly appears, from so much as is stated of the charge, that the jury must have found that the defendant's intestate, by the structures which she maintained upon her land, caused a substantially larger volume of water to be accumulated and discharged, and thereby contributed to form ice upon the cross walk so as to increase substantially the amount of such ice. And it is to be noted that the bill of exceptions, though setting out all the material evidence, contains no direct evidence that any of the water which formed this ice came from any other source than that alleged by the plaintiff. However this may be, it is enough if the structures maintained by the defendant's intestate resulted in artificially collecting a body of water which discharged upon the street, and thereby caused the formation of a dangerous mass of ice. *Bates* v. *Westborough*, 151 Mass. 174, 181. *Curtis* v. *Eastern Railroad*, 98 Mass. 428, 431. Accordingly the instructions given are not open to criticism. See *Jackman* v. *Arlington Mills*, 137 Mass. 277, 284.

Exceptions overruled.

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ANNA T. SCHELL, executrix, *vs.* JOSEPHINE M. SCHULER, administratrix *de bonis non* with the will annexed.

Suffolk. January 15, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Devise and Legacy. Words, "Connected therewith."

A testator devised to his son "all the real estate at 1354 and 1358 Washington St. Boston, together with all the personal property connected therewith, consisting of horses, carriages carts furniture fixtures, the good will in the business all stock in trade — the same now used in part as a bakery and dwelling houses." When the testator made his will and at the time of his death he owned a chose in action consisting of a claim against the Boston Elevated Railway Company for damages to the above named property from the construction and operation of its elevated railway. The testator had other real estate which he devised for the benefit of two of his daughters. He directed that his son to whom he made the devise above quoted should pay to a third daughter of the testator $5,000 out of his "share above stated, which with the amounts that I have heretofore given her I believe is her fair share." The will contained no residuary clause. The inventory of the testator's estate showed that there was other property not disposed of by the will. *Held*, that the devise to the son of the testator did not include the claim for damages, which must be distributed as intestate property not disposed of by the will.

In a devise of real estate on a city street "together with all the personal property connected therewith, consisting of horses, carriages carts furniture fixtures, the good will in the business all stock in trade — the same now used in part as a bakery and dwelling houses" the words "connected therewith" do not describe or include a claim against a corporation operating an elevated railway for damages to the real estate from the construction and operation of its railway in front of the premises.

APPEAL from a decree of the Probate Court for the county of Suffolk allowing the account of Peter C. Schell as executor of the will of Peter Schell, late of Boston.

Peter Schell died on January 3, 1900. He left a widow and four children, namely, Peter C. Schell, Mrs. Katie Luppold, Mrs. Mary A. Reiss [written "Rice" by the testator] and Mrs. Josephine M. Schuler. The will of Peter Schell, omitting the introductory and attesting clauses, was as follows:

"After the payment of my just debts and funeral charges, I bequeath and devise as follows:

"To Peter C. Schell, my son, all the real estate at 1354 and 1358 Washington St. Boston, together with all the personal property connected therewith, consisting of horses, carriages

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carts furniture fixtures, the good will in the business all stock in trade — the same now used in part as a bakery and dwelling houses. I also appoint him, said Peter C. my son, executor of this my will, requesting that he be not required to give bond.

"I direct that my said son, Peter C. as soon after my death as may be, pay to Katie Luppold, my daughter, wife of Frank Luppold, now residing in Heidleburg, Germany, five thousand (5000$) dollars out of his, Peter C's share above stated, which with the amounts that I have heretofore given her I believe is her fair share.

"To Mary Ann Rice, my daughter, wife of Joseph Rice, six thousand dollars (6000$) out my homestead at 1224 & 1226 Washington St. Boston, or if she prefirs and elects to retain said 1224 & 1226 property she shall pay to Josephine M. Schuler, my daughter, wife of Mathew Schuler, six thousand dollars (6000$) as soon after my death as may be. After my death if said property at 1224 & 1226 should bring 18000$ or more or if the same should bring less than that amount and Mr. Rice should decline to keep it and pay 6000$ to Mrs. Schuler, after my death and the death of my wife I direct that said property at 1224 and 1226 Washington St. be sold and the proceeds above the sum of 6000$ first to be paid to Mrs. Rice, the balance of the amount be devided equally between the said Mrs. Rice and Mrs. Schuler I mention this as Mrs. Schuler has already had six thousand and Mrs. Rice nothing.

"I direct that so long as my wife lives she shall be provided for out of my said estate as she directs and desires for her comfort and support."

The case was heard on appeal by *Loring*, J. The principal question was in regard to $5,500 and interest due for damage done by the elevated railway to the estate numbered 1354–1358 Washington Street. The right to compensation for this damage had accrued not only before the testator's death, but before he made his will. The justice decided that this claim for damages did not pass by the devise of the property numbered 1354–1358 Washington Street to Peter C. Schell and was undisposed of by the will, and, being of opinion that the question whether the claim for damages passed under the will of Peter Schell to Peter C. Schell, or whether Peter Schell died intestate so far as that

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property was concerned, so affected the merits of the controversy that the matter ought, before further proceedings, to be determined by the full court, with the consent of the parties reported that question for determination by the full court.

H. P. Harriman, (*H. E. Perkins* with him,) for the plaintiff.

W. C. Cogswell, for the defendant.

MORTON, J. The only question arising upon the report is, whether the claim for damages by reason of the location of the railway in front of the premises 1354 and 1358 Washington Street passed to Peter C. Schell under the will of his father Peter Schell, or is undevised estate. The devise is as follows: "To Peter C. Schell, my son, all the real estate at 1354 and 1358 Washington St. Boston, together with all the personal property connected therewith, consisting of horses, carriages carts furniture fixtures, the good will in the business all stock in trade — the same now used in part as a bakery and dwelling houses." The only other clause in the will which is now material immediately succeeds this and is as follows: "I direct that my said son, Peter C. as soon after my death as may be, pay to Katie Luppold, my daughter, wife of Frank Luppold, now residing in Heidleburg, Germany, five thousand (5000$) dollars out of his, Peter C's share above stated, which with the amounts that I have heretofore given her I believe is her fair share." The claim for damages accrued before the execution of the will, and the contention of those representing the estate of Peter C. Schell, the son, is that the words "which with the amounts that I have heretofore given her I believe is her fair share" in the bequest to Katie Luppold show in connection with the rest of the will and the circumstances of the case an intention on the part of Peter Schell not to die intestate, and that, in order to avoid intestacy and carry out the testator's intention, the words "consisting of horses, carriages carts" etc. can be and should be disregarded and the devise of "all the real estate at 1354 and 1358 Washington St. Boston, together with all the personal property connected therewith" can be and should be construed to include the claim for damages.

It is no doubt true that in the search for the testator's intention words may be disregarded or supplied if thereby his intention as manifested by the language used may be brought to light

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and effect given to it. *Boston Safe Deposit & Trust Co.* v. *Buffum*, 186 Mass. 242. *Dean* v. *Gibson*, L. R. 3 Eq. 713. If, for instance, it appeared in the present case that the testator intended to dispose of the whole of his estate by his will and intestacy would be avoided by disregarding the words "consisting of horses" etc., that might be done. So too if it clearly appeared that he intended to include the claim for damages in the devise of the real estate at 1354 and 1358 Washington Street, effect would be given to such intention notwithstanding the words describing the personal property which follow. But there is no residuary clause in the will and we do not see how an intention not to die intestate can be inferred from the words quoted above from the Katie Luppold bequest and the circumstances as disclosed by the agreed facts. The inventory shows that the will did not in fact dispose of the whole estate so that if there was such an intention it failed of accomplishment. And the words quoted from the Katie Luppold bequest may have referred and probably did refer to what was her fair share as compared with the $6,000 given to each of her sisters.

The question then remains whether the devise of the real estate at 1354 and 1358 Washington Street can or should be construed to include the claim for damages. If the devise had been of the real estate, and of all of the personal property "consisting of horses" etc., there would be strong ground for holding that the description of the personal property was a *falsa demonstratio*, and that the claim for damages passed under the general phrase "all personal property." But the devise is not of the real estate and all the personal property, but of the real estate "together with all the personal property connected therewith, consisting" etc. Although the claim for damages grew out of the real estate devised it cannot be said in any proper sense to be "connected therewith." At the time when the will was executed the claim for damages was a chose in action. It had no connection with the real estate and would not have been included in a conveyance thereof. It is possible that the testator, if he thought of the matter at all, may have supposed that it was included in the devise to his son. But as the will is drawn, we feel compelled to hold that the claim for damages did not pass to the son, but must be regarded as intestate property.

Decree accordingly.

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GEORGE A. P. CODWISE, executor, *vs.* GEORGIANA S. LIVERMORE & another.

GEORGIANA S. LIVERMORE & another *vs.* GEORGE A. P. CODWISE, executor.

Norfolk. January 15, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Probate Court, Appeal.

On an appeal from a decree made by a single justice upon an appeal from a decree of the Probate Court, where the justice heard the case upon evidence introduced before him including the report of an auditor appointed by the Probate Court, and no part of the evidence is before this court except the report of the auditor, and no findings of fact have been filed, the decree of the single justice must be affirmed if he had jurisdiction to make it.

The statement of objections to a decree of the Probate Court, which by R. L. c. 162, § 10, is required to be filed with an appeal to give a single justice of this court jurisdiction to try the case, is not to be construed with the strictness which would be applied to a pleading at common law. It is enough if it indicates clearly the issue intended to be raised.

APPEAL from a decree of the Probate Court for the county of Norfolk allowing the accounts of George A. P. Codwise as executor of the will of John W. Shaw, late of Wellesley, namely, the eleventh and eleven previous accounts, including the trustee's account, so called, except that the executor's charges for services in all of the accounts were reduced from $7,563.61 to $5,000, and it was ordered that the executor should stand charged with the sum of $2,563.61, the amount claimed by him in all the accounts for services in excess of the amount allowed him in the decree, and that this sum should be added to the balance of $2.98 stated in his eleventh account, making the total amount for which the executor should stand charged $2,566.59.

Georgiana S. Livermore and Fanny M. Hildreth, the only residuary legatees under the will of John W. Shaw, appealed from the decree of the Probate Court and filed with their appeal five objections to the decree. The executor also appealed from the decree of the Probate Court, stating in separate paragraphs seventeen reasons for his appeal.

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The case was heard on appeal by *Hammond*, J., who admitted an auditor's report which had been filed in the Probate Court and took it as a part of the evidence in the case. He made a decree that all the accounts be allowed, and ordered that the executor should stand charged with the sum of $2.98, and that the case should be remitted to the Probate Court for further proceedings. The residuary legatees appealed. They also took exceptions, of which they afterwards filed a waiver.

C. E. Washburn, for the residuary legatees.

H. P. Harriman & H. E. Perkins, for the executor, were not called upon.

SHELDON, J. As the exceptions filed in these cases have been waived, nothing is before us but the appeal from the decree made by a single justice of this court. It appears that this decree was made upon evidence heard by him, which included the report of an auditor appointed by the Probate Court. No findings of fact have been filed, and no part of the evidence is before us, except the report of the auditor. Unless therefore it appears that the single justice had no jurisdiction to enter the decree appealed from, we must affirm his decree. *Hodgdon* v. *Fuller*, 193 Mass. 331. *Slack* v. *Slack*, 123 Mass. 443.

But the residuary legatees contend that on the appeal of the executor from the decree of the Probate Court he was restricted to the matters stated in the reasons of appeal filed by him; that the jurisdiction of this court was limited to considering the objections or reasons of appeal so filed; that these objections should have pointed out specific errors in the decree appealed from, or else the appeal should have been dismissed; that the objections filed by the executor in these cases showed no such specific errors, but merely recited certain facts which might be used in explanation or support of the executor's contentions; so that the single justice had no jurisdiction to make the decree appealed from. In our opinion this contention cannot be sustained.

The history of the legislation on this subject is contained in *Bartlett* v. *Slater*, 183 Mass. 152. For the reasons there stated, the decisions made previous to 1888 as to reasons of appeal then required to be filed, are not now applicable to their full extent, although it is still true, as was held in that case, that the objec-

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tions to the decree appealed from must be filed in this court simultaneously with the entry of the appeal, that these objections must disclose the issue to be tried, being in the nature of an assignment of errors, and that the jurisdiction of the court to try the case on the appeal depends upon compliance with the conditions imposed by the statute. R. L. c. 162, § 10. *Cowden* v. *Jacobson*, 165 Mass. 240. *Harris* v. *Harris*, 153 Mass. 439. *Murphy* v. *Walker*, 131 Mass. 341.

But it never has been held that such a statement was to be construed with the strictness that would be applicable to a pleading at common law. A statement of objections in this case was filed by the executor, and the court thus acquired jurisdiction of his appeal. *Bartlett* v. *Slater*, 183 Mass. 152. It would be enough to say that for this reason the decree of the single justice must be affirmed, as neither the evidence nor the grounds upon which it was entered are before us. But in our opinion the statement filed by the executor gave full notice to the other parties in interest that his objection was to that part of the decree which reduced the amount to be allowed to him for fees of himself and others from the sum which he claimed to the sum of $5,000. His objections are set forth argumentatively and in many instances by a statement of the reason for the objection rather than of the objection itself. But it is impossible to read through his statement of objections without seeing clearly that the issue which he intends to raise is that which we have stated. This is enough.

Accordingly, the decree of the single justice must be affirmed; and it is

So ordered.

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RICHARD H. GROGAN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 17, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence. Street Railway.

In an action against a street railway company for injuries to the plaintiff and to his buggy from being run into by a car of the defendant as the plaintiff was driving over the tracks of the defendant at a street crossing, there was evidence that it was a wet and stormy day with the wind blowing hard, that the car was going "at a breakneck speed" from twenty to twenty-five miles an hour, that no bell was rung and no gong was sounded. The plaintiff testified that when he turned upon the track he looked and saw no car, and knew positively "the car was not right within close proximity," that he put his head out of the buggy both before he turned to go across the track and after he had turned for the crossing, that he could not say that he looked the moment before his horse stepped on the second track, on which the car was coming, but while he was crossing over he looked through the glass in the top of the buggy, that the glass was wet with rain but did not obstruct his view, that the last time he put his head out his horse and buggy were about in the first track, that he got a view down the track as far as a street which was five hundred and sixty feet distant and saw no car, and that the point from which he looked was about twenty-five feet from the place where he was struck by the car. *Held*, it being conceded that there was evidence of negligence on the part of the motorman, that the question of the plaintiff's due care was one for the jury.

MORTON, J. One of the defendant's cars came into collision with the buggy in which the plaintiff was driving, as he was crossing the out-bound track at Chilmark Street on Commonwealth Avenue, and threw him out and damaged the buggy. This action is to recover for the personal injuries thus received, and for the damage to the buggy. There was a verdict for the plaintiff and the case is here on the defendant's exceptions. The only question which has been argued by the defendant is whether the jury should have been instructed, as requested, to return a verdict for the defendant. It is not contended that there was not evidence of negligence on the part of the motorman.

The plaintiff testified on direct examination that, as he turned on to the crossing, he "looked down" and "could see the track down as far as St. Mary Street and the houses below St. Mary

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Street and there was nothing to be seen," and that he walked his horse leisurely across, turning a little after he had got across one track to avoid a depression in Commonwealth Avenue with water in it. He was asked if he heard any sounding of bell or gong and he answered "No sound of anything." On cross-examination he testified "that when he turned on to the track he looked but didn't see the car; that he knows positively the car was not right within close proximity; . . . that when he looked to see if a car was coming, he had begun to turn on and headed the horse that way; . . . that he put his head out of the buggy both before the time before he turned to go across the track and after the time that he turned to head for the crossing; . . . that he can't say that he looked the moment before his horse stepped on the second track, the track the car was coming on, but he looked while he was crossing over through the glass in the top of the buggy; that the glass was wet from the rain but it didn't obstruct the view; that the last time he put his head out his horse and buggy were about in the first track; that he got a view down to St. Mary Street . . . and could see five hundred and sixty feet; that from the point where he was when he looked out his horse went about twenty-four feet to the place where he was struck; that when he looked down to St. Mary Street a distance of five hundred and sixty feet he saw St. Mary Street but saw no car." There was testimony tending to show that it was a wet and stormy day with the wind blowing hard, and that the car was going at from twenty to twenty-five miles an hour; — "at a breakneck speed," as one of the witnesses testified. There was also testimony tending affirmatively to show that no bell was rung or gong sounded. The defendant introduced testimony contradictory of and irreconcilable with that introduced by the plaintiff as to the speed with which the car was going, and the ringing of a bell or gong, and the circumstances under which the accident happened, and tending to show that the plaintiff turned almost directly across the track in front of the approaching car, and could or should have seen the car for nearly half a mile. But the question was one, we think, for the jury to pass upon. We do not see how it could have been ruled as matter of law that the plaintiff was not in the exercise of due care. We think that the case was

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rightly left to the jury. *Robbins* v. *Springfield Street Railway*, 165 Mass. 30. *Hennessey* v. *Taylor*, 189 Mass. 583.

Exceptions overruled.

E. P. Saltonstall & S. H. E. Freund, for the defendant.

J. Bennett, (*H. Bergson* with him,) for the plaintiff.

MARTHA V. BEVERLEY *vs.* BOSTON ELEVATED RAILWAY COMPANY.

EDWARD BEVERLEY *vs.* SAME.

Suffolk. January 17, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Evidence, Opinion, Matters of common knowledge, Materiality. *Carrier*, Of passengers *Negligence. Elevated Railway. Pleading, Civil*, Variance.

An ordinary observer may testify as to his conclusions of fact at the time of his observation in regard to a condition of things which can be understood by men in general and which cannot be reproduced before the jury as it appeared to the witness.

In an action by a woman passenger against a corporation operating an elevated railway for personal injuries caused by the alleged failure of the defendant to limit or control the crowd of passengers upon a platform of one of its terminal elevated stations, the plaintiff on her cross-examination of a motorman of the defendant may ask him whether, if three cars each unloaded thirty-three passengers upon a certain part of the platform, it would make a fair sized crowd on that platform.

In an action by a woman passenger against a corporation operating an elevated railway for personal injuries caused by the alleged failure of the defendant to limit or control the crowd of passengers upon the platform of one of its terminal elevated stations, the plaintiff, on her cross-examination of the chief inspector of the division of the defendant's railway in which the accident occurred, may ask him whether the size of the crowd on the platform of the station could be controlled by controlling the number of persons allowed to enter the station through the turnstiles, and by regulating the number of surface cars and the number of elevated trains allowed to go into the station. If the answer to this question is matter of common knowledge the defendant is not harmed by its admission, and, if not such matter, it is admissible.

In an action by a woman passenger against a corporation operating an elevated railway for personal injuries caused by the alleged failure of the defendant to limit or control the crowd of passengers upon the platform of one of its terminal stations, by reason of which the plaintiff in attempting to go from a surface car

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to take an elevated train was pushed off the platform and fell into the pit containing the adjoining surface car track, and was injured, the plaintiff offered to prove that at some time after the accident the defendant had extended its platform so as to cover twenty-five feet in length near the place where the plaintiff fell. The defendant's counsel had admitted that it was physically possible to increase the platform in this way but refused to concede that it was practically possible. The plaintiff offered the evidence to show that the increase of space was practically possible. The judge admitted the evidence for this limited purpose, instructing the jury that it was not evidence of negligence on the part of the defendant. *Held*, that the evidence was competent for the limited purpose for which it was admitted.

In an action by a woman passenger against a corporation operating an elevated railway for personal injuries caused by the alleged negligence of the defendant in failing to provide for limiting or controlling the crowd of passengers upon the platform of one of its terminal stations, the presiding judge properly may refuse to allow the defendant to ask its superintendent of the division where the accident occurred whether in determining the plan of operating such a railway it is proper to take into consideration the desire of the travelling public to take their chances in the crowd rather than to be kept back, where such desire can be taken into consideration without interfering with safety in the operation of the railway, such inquiry not only being immaterial but tending to distract the attention of the jury from the issue of the defendant's negligence.

In an action by a passenger against a corporation operating an elevated railway for personal injuries from being pushed off an overcrowded platform at a station, it is evidence of negligence on the part of the defendant that it failed to provide a sufficient number of competent servants to guard its passengers from the dangers incident to the platform being overcrowded.

In an action by a passenger against a corporation operating an elevated railway for personal injuries from being pushed off an overcrowded platform at a terminal station of the defendant when attempting to go from a surface car to take an elevated train, it is evidence of negligence on the part of the defendant that the portion of the platform where passengers alighted from surface cars was too small to take care of the passengers who were landed on it; and it also is evidence of such negligence that a guard who should have been on this part of the platform to prevent pushing and crowding, if he could, was not there when the plaintiff was injured.

In an action by a passenger against a corporation operating an elevated railway for personal injuries from being pushed off an overcrowded platform at a terminal station of the defendant when attempting to go from a surface car to take an elevated train, if there is evidence that the portion of the platform where passengers alighted from surface cars was too small for the purpose and might have been made larger, this is evidence of negligence on the part of the defendant in the construction or maintenance of its platform on which the plaintiff is entitled to go to the jury, although this ground of negligence was not alleged in the declaration, if the objection of the variance was not taken at the trial.

If a corporation operating an elevated railway at certain hours of every week day assembles on the platforms of its stations such large crowds of passengers necessarily going in opposite directions, that on one of these occasions a passenger on the outside of the crowd, in spite of all he can do, is pushed off the platform into the adjoining pit in which the tracks are laid, and the accident is due solely to the ordinary crowding which occurs during rush hours, the railway company is liable to the passenger for his injuries thus caused.

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TWO ACTIONS OF TORT against the Boston Elevated Railway Company, the first by a married woman for personal injuries incurred on December 3, 1903, at the Sullivan Square terminal station of the defendant's elevated railway, and the second by the husband of the plaintiff in the first case for the loss of her services and the expenses of care and medical attendance made necessary by her injuries. Writs dated January 15, 1904.

In the Superior Court the cases were tried together before *Wait*, J. The plaintiff in the first case testified that she had lived in Saco, Maine, for the past five years and was sixty-four years of age; that previously she had lived in Boston, but she had never been to Sullivan Square while she lived here and did not remember that she had ridden on the elevated railway; that about a week before the day of the accident she came to visit friends who lived at Grove Hall; that the day before the accident she had ridden on the elevated railway to Sullivan Square somewhere between eleven and twelve o'clock, and there took a Melrose car; that she was in the station not more than five minutes and there were very few people there; that she did not return to Boston by way of Sullivan Square, but by steam cars; that on the day of the accident she took the train to Sullivan Square and got there about eleven o'clock; that she remained perhaps five or ten minutes and then took an Everett car; that there were very few passengers in the station; that she came back from Everett to Sullivan Square at one o'clock and remained about a half an hour, taking lunch at the lunch counter; that there was no crowd; that she then took a Magoun Square car for Somerville; that she returned from Somerville, getting into the station between half past five and six, a little before six; that no announcement was made in the car as it came in; that she got off from the car upon the platform; that there was no car ahead of them on the same track; that there were a great many people on the platform when she got off; that she tried to get to the elevated, — started to walk out to the elevated, and there was a crowd up behind her and there was a crowd that crowded in to get on to the car she got off from. They were pushing in the opposite direction. They were coming this way and that way. "I got on the side with the crowd going this way, — what I supposed was the right way to go. I was trying my

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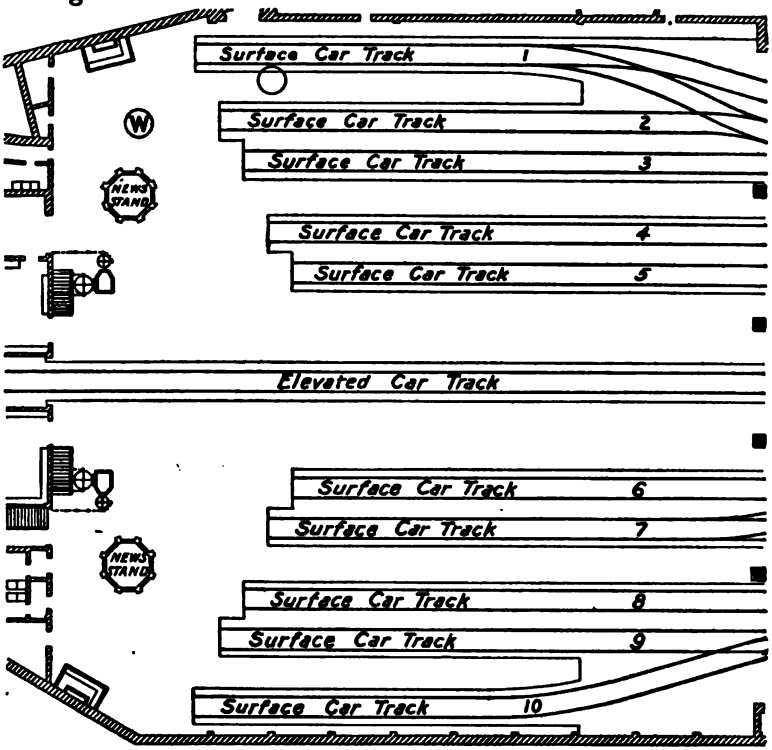
best to get out and they kept pushing me over and pushing me over until I went right off. They pushed me right off the platform, forced me off." She further testified "that she did not see any railroad man in uniform, what is called a guard, and nobody protected her." When pushed off the platform she fell into the pit containing the adjoining surface car track and broke her leg.



A witness called by the plaintiff testified that for a year he had used the Sullivan Square terminal twice a day six days in the week and that his usual hour for going home was about half past five; that he was on his way home at the time of the accident. A plan of the Sullivan Square station showing the tracks and the platforms was shown to the jury and also to this witness. The above is a reduced copy of a part of this plan.

This witness testified that when he saw the plaintiff in the first case he was walking across the platform from the elevated to track 1 for the purpose of taking a Broadway car to Somer-

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ville. (The letter W on the plan shows where the witness said he was.) The first thing that attracted his attention to the accident was seeing the woman fall on the track. She was on the outer border of a large crowd of people coming from the inbound cars, making their way to the elevated. At the same time there was another crowd making their way to the surface cars. At about the point where these two crowds met she was on the outer border, and when his attention was attracted to her she was pushed off at that point on to track 1; that as a rough estimate she was about fifteen feet from the end of track 1 when she fell; he was then about fifteen feet from the end of track 1 toward the elevated; that there were no cars on track 1 behind her when she fell and that there was at least one car on track 2; that the platform was as full as it well could be; that he had been there a good many nights at about that time, for the purpose of taking a car at the same place, and in size and action the crowd was just about a typical crowd at that time in the evening on week days in about that place; that the width of the platform between tracks 1 and 2 was seven feet four inches according to a measurement which he took a week later. On cross-examination this witness testified that he was six feet four inches tall and that he could see the plaintiff fall by seeing over the crowd.

A witness, called by the defendant, who also was present and saw the plaintiff in the first case fall from the platform into the pit, "testified that he went through Sullivan Square station twice a day, sometimes four times, nearly every night at the same time; that the crowd was about the same size as an average crowd that he saw there nights; that the movement of the crowd was no different from the movement of the average crowd there on the average night; that he did not see the last push, if it was a push, which caused this woman to fall; that he saw the crowd was moving both ways; that he noticed they were moving before he saw the lady fall."

A motorman in the employ of the defendant, called by the defendant, was asked on cross-examination "If three cars unloaded thirty-three passengers each upon the platform between [tracks] Nos. 1 and 2 would it make a fair sized crowd on that platform?"

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The defendant objected to the question on the ground that it called for a conclusion the jury were able to form as well as the witness.

The judge said: "I do not so understand the question. I understand the question to be, assuming that number of people are left by the cars there, in his judgment, would it be what he calls a usual crowd on the platform? In that sense I allow the question to be answered." The witness answered: "No, sir." — "Q. Ordinarily it would be larger than that? A. Sometimes."

One James, who was the chief inspector of the division of the defendant's railway in which the accident happened, called by the defendant, was asked on cross-examination: "Now, by controlling the number of people, by controlling the number of cars, that went into the station from the surface tracks, in a measure the railway company could control the number of passengers in that station, could it not?" The defendant excepted to this question. The witness answered: "I should say so." The witness also was asked: "By controlling the number of people that went through the turnstiles, in a measure the crowd could be controlled, which would gather up above?" The defendant excepted to the question. The witness answered: "Yes, sir, as far as I know." The witness also was asked: "By controlling the incoming of trains on the elevated, in a measure the crowd in the station could be controlled?" The defendant excepted to the question. The witness answered: "As far as I know, yes, sir." The witness also was asked: "By controlling all three of those methods of approach, the railroad had it in its power to control the size of the crowd which would be at the station?" The defendant excepted to the question. The witness answered: "I should say so."

An exception of the defendant to the admission of evidence in regard to the extension of the platform at some time after the accident and the limited purpose for which this evidence was admitted by the judge are described in the opinion. At the close of his charge the judge at the suggestion of the defendant cautioned the jury in regard to this evidence not being admissible to show negligence as follows: "The change in the space at the end of the second track, gentlemen, evidence with regard to that was admitted solely for the purpose of showing what it is possi-

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ble to do with regard to the platforms there in handling the various crowds. It is not admitted as any evidence of negligence. The fact that the railroad made the change afterward is no evidence which you have a right to consider that it was negligent in having the condition which existed at the time of the accident."

One Pasho, the superintendent of the division of the defendant's railway in which the accident occurred, was called as a witness by the defendant. In his direct examination he was asked the following question: "In determining the plan of operating a street railway whether or not in your opinion as an expert railroad man, it is proper to take into consideration the desires of the travelling public, where they can be taken into consideration without interfering with safety in the operation of the railway."

The plaintiff objected to this question and the judge excluded it, stating that it hardly was a matter for expert testimony, and was something the jury could pass upon.

The defendant made the following offer of proof: "I wish to show complaints which would arise from the travelling public if cars were kept out on the structure and the passengers therein were not permitted to alight on the platform and take their chances in the crowd; that the complaints would be greater than they are or have been from the fact that the station platforms are crowded. It is for that purpose that I am asking this question and subsequent questions." The judge excluded the question subject to the defendant's exception.

There was evidence that one Taylor was a person employed by the defendant whose duty it was to be on the platform between the tracks 1 and 2 and to prevent pushing and crowding if he could; that he was the only person employed there for that purpose; and that he was not present at the time of the accident.

The defendant asked the judge to make, among others, the following rulings:

8. There is no evidence of negligence on the part of the defendant in either the construction or maintenance of the roadbed or platform, on or near which the plaintiff claims she was injured.

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6. The defendant owed to the plaintiff under all the circumstances of this case only ordinary care.

8. The defendant is not responsible for the negligent acts of other passengers which it could not foresee, nor is it responsible for accidents happening solely through the ordinary rushing and crowding which occurs on the elevated system during rush hours.

The judge refused to make the rulings numbered three and six, and also refused to make the portion of the ruling numbered eight beginning with the word "nor" after the first clause. The defendant excepted to these refusals.

The jury returned a verdict for the plaintiff in the first case in the sum of $4,000 and for the plaintiff in the second case in the sum of $2,000. The defendant alleged exceptions.

E. P. Saltonstall & S. H. E. Freund, for the defendant.

W. I. Badger, (*P. G. Carleton & N. L. Frothingham* with him,) for the plaintiffs.

LORING, J. 1. The exception must be overruled to the admission of the question: "If three cars unloaded thirty-three passengers each upon the platform between Nos. 1 and 2 would it make a fair sized crowd on that platform?"

An ordinary person does not know from a statement of the facts whether the unloading of three cars containing thirty-three passengers each would make a fair sized crowd on the platform in question, the dimensions of which were in evidence. That is a conclusion relating to matters which are capable of being understood by men in general and which cannot be reproduced before the jury precisely as they appeared to the witness. The evidence comes within the rule laid down in *Commonwealth* v. *Sturtivant*, 117 Mass. 122.

2. We are of opinion that the judge could allow the plaintiff to ask James, the defendant's inspector of surface cars on the division in question, whether the crowd on the platform of the station could be controlled by the number of incoming surface cars allowed to go into the station, by the number of persons allowed to go into the station through the turnstiles, and by the number of incoming elevated trains allowed to go into the station; and that by controlling them in these ways the size of the crowd in the station could be controlled. The issues being

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tried were in substance: First, was the defendant negligent in allowing the crowd to gather which did gather on the platform at the time in question? Second, was it negligent in the means which it adopted to control it? Third, was it negligent in the area of its platforms in connection with the length of tracks for cars to stand at one time in delivering and taking on passengers? The means which it had to prevent a crowd from gathering on the platform was a fact to be proved. The only objection made by the defendant is that every one knows the facts proved. If they do, the defendant was not injured by the admission of the evidence. If they do not, the evidence was admissible.

3. The next exception argued is the ruling of the judge that it was competent for the plaintiff to prove that at some time since the accident the defendant had extended its platform so as to cover twenty-five feet in length of the inner end of track 1. This was offered by the plaintiff to show that it was not only physically possible to increase the platform in this way, which the defendant's counsel admitted, but that it was practically possible, having regard to the conduct of its business, which the defendant's counsel refused to concede. The judge ruled that it was competent for the purpose for which it was offered, but not for the purpose of showing negligence on the part of the defendant at the time in question. For this purpose, under this condition of the evidence and of the contentions made by the defendant, the evidence was competent. No objection was made at the trial that the negligence alleged in the declaration did not cover this. For that reason this objection, if well taken, is not open now.

4. One of the questions on trial was whether the defendant had been negligent in providing for the safety of passengers on its platforms arising from the dangers incident to the platforms being overcrowded. To go into a consideration of the propriety on the part of the defendant's officers of consulting the desires of the travelling public to be carried rapidly when that could be done "without interfering with safety in the operation of the railroad" was not only not material to the issue on trial but would have tended to distract the attention of the jury from that issue. The presiding judge was right in excluding the question put to Pasho.

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5. The plaintiff had a right to go to the jury on the doctrine of *Kuhlen* v. *Boston & Northern Street Railway*, 193 Mass. 341, and also on these two further grounds: (1) That the platform in question was too small to take care of the passengers who landed on it; and (2) that the guard (Taylor by name) who should have been on this platform was not there.

6. There was evidence that the platform was too small for the passengers who could be and were delivered on to it. The objection that this ground of negligence was not alleged in the declaration was not taken at the trial, as we have said before. The third ruling asked for was rightly refused.

7. It is hard to understand the contention of the defendant in insisting that the second part of the eighth ruling asked for by it should have been given. The jury were warranted in finding that the two crowds going in opposite directions were so great that the plaintiff was without her fault thrown off the platform on which the defendant placed her, into the pit of No. 1 track. Its contention under the eighth request for a ruling is that if this is the ordinary crowding which occurs during rush hours and the accident is due to that alone, it is not liable. But in our opinion that would make it liable. We do not see how a jury could find that the defendant company was not negligent when it continued to assemble on its platforms, at certain hours in the day, such large crowds, necessarily going in opposite directions, that those on the outside, in spite of all they can do, are carried off the platform into the trench in which the tracks are laid.

Exceptions overruled.

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COMMERCIAL WHARF CORPORATION *vs.* CITY OF BOSTON.
SAME *vs.* SAME.

Suffolk. January 17, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Landlord and Tenant. Municipal Corporations. Evidence, Presumptions and burden of proof, Of occupation, Self serving acts. *Maxims, Omnia rite esse acta praesumuntur.*

A wharf corporation made a lease to a city of the right to use a part of its dock and flats "for a public float and landing place for boats" and "the right to drive, cap and maintain four oak piles, one at each corner of said float, to keep the same in position; also the right to build a platform" from one side of the pier "and a run or other suitable approach from said platform to said float, and to drive such piles as may be necessary in building said platform and approach." The city did all of these things. The lease contained a covenant by the city binding it to pay rent at the rate stipulated in the lease for such further time as it should hold the premises or any part thereof after the term of the lease or any extension of that term had expired. An extension of the term of the lease expired on December 1, 1901. In November, 1898, the city removed the float for repairs, and it never was brought back, but all the other structures erected by the city remained, as did also a notice purporting to be signed by the superintendent of streets reading "City of Boston Public Landing. Boats not allowed to tie up here." No notice of abandonment of the leased premises was given by the city. On August 6, 1903, the mayor sent a letter to the wharf company notifying it that at the end of the quarter which should begin next after that date the city would quit and deliver up the premises theretofore used by it for a float and landing place. Later the wharf company brought an action of contract on the covenants of the lease for the rent from March 1, 1903, to December 1, 1903. The plaintiff offered in evidence the letter of the mayor mentioned above which was excluded by the judge. The plaintiff also, for the purpose of showing that payments of rent were made by the defendant after the expiration of the extension of the lease up to April, 1903, offered in evidence entries in a book kept by the plaintiff's deceased wharfinger containing declarations to that effect. This evidence was excluded by the judge on the ground that no authority from the city to make the alleged payments had been shown. The judge also excluded evidence offered by the plaintiff to show that between December 1, 1901, and December 1, 1903, it made no charge for landing on the platform constructed by the defendant under the lease, although it made a charge after the last named date and made charges for a similar use of other parts of the wharf. The judge ordered a verdict for the defendant. *Held*, that the removal of the float for repairs by the defendant in November, 1898, did not constitute an abandonment of the premises; that the letter of the mayor should have been admitted in evidence as tending to show that the defendant was holding over when the letter was written; that in connection with other evidence it was competent for the plaintiff to show that it had recognized the alleged occupation of the defendant by refraining from making any charge for landing upon the platform; that

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the entries in the books of the deceased wharfinger should have been admitted in evidence, as in the absence of evidence to the contrary it would be presumed that the payments stated in the entries were made with authority; and that the liability of the defendant depended on whether it had occupied any part of the leased premises during the period sued for, which was a question of fact for the jury.

The acts of a public official are presumed to have been done rightly until the contrary is shown.

On the issue whether a city has surrendered certain leased premises on the termination of a lease or has continued to occupy them so as to be liable on a covenant to pay rent during such occupation, the liability of the city is to be determined as that of any citizen would be.

TWO ACTIONS OF CONTRACT against the city of Boston for rent alleged to be due under a covenant in a lease from the plaintiff to the defendant dated November 30, 1891, the first action for $250 as rent for the quarter from March 1 to June 1, 1903, and the second action for $500 as rent for the two quarters from June 1 to December 1, 1903. Writs in the Municipal Court of the City of Boston dated August 17 and December 14, 1903.

On appeal to the Superior Court the cases were tried together before *Hardy*, J. The evidence disclosed the following facts:

On June 24, 1891, the following order was passed by the city council and approved by the mayor: "Ordered, That the board of health be hereby authorized to lease for a term of five years from the Commercial Wharf Corporation a location for a boat landing at a cost not to exceed one thousand dollars per annum, the amount to be charged to the appropriation for city council, incidental expenses."

Acting under this order the plaintiff and the defendant executed a lease dated November 30, 1891, for the term of five years beginning with December 1, 1896, whereby the plaintiff leased to the defendant

"The right to use for a public float and landing place for boats a certain parcel of flats and dock lying between the north and south piers of Commercial Wharf in said Boston; said parcel is to be not larger than is necessary for a float and landing place thirty by fifty feet in size, and the west end thereof is to be fourteen feet east of the club house now at the head of said dock; also the right to drive, cap and maintain four oak piles, one at each corner of said float, to keep the same in posi-

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tion; also the right to build a platform from the south side of said north pier, and a run or other suitable approach from said platform to said float, and to drive such piles as may be necessary in building said platform and approach.

"All of said work is to be done in such a manner as the superintendent of streets of said city may deem advisable; and the lessor agrees to keep open twenty-five (25) feet in width of the dock as a passageway from the outer end of the dock to said float, and that all persons desiring to use said float shall have the right at all times to pass from Atlantic Avenue to the leased premises, for the purpose of using the same as a public float or landing place."

The lease also contained the following covenants:

"And said lessor agrees that said city may, within two months from the expiration of this lease, remove all piles, floats, platforms, approaches and other erections, placed and used by it in connection with said public float and landing place as aforesaid.

"And said lessee hereby covenants and promises with and to the said lessor, its successors and assigns, that it will, during the said term and for such further time as said lessee, or any other person or persons claiming under it, shall hold the said premises, or any part thereof, pay unto the lessor, its successors or assigns, the said yearly rent upon the days hereinbefore appointed for the payment of the same. . . .

"It is agreed that this lease shall terminate within said term whenever the appropriation for said purpose is insufficient to meet the expense thereof, upon notice to the lessor from the superintendent of streets of said city of such insufficiency."

Acting under this lease the defendant entered into the premises and constructed and maintained the float, piles and platform therein referred to.

On November 30, 1896, the city council passed an order authorizing a renewal of this lease for five years, and in March, 1897, the following extension of the lease was executed by the plaintiff and the defendant:

"The within lease is hereby extended for the term of five years from December 1, 1896, subject to the like rent payable in like manner as within mentioned, and to all the provisos

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covenants and agreements within contained — and thereto the undersigned parties to the said lease mutually bind themselves.

"Boston, March, 1897."

In November, 1898, the float was damaged and was taken away by the defendant for repairs and never was brought back.

One Corea, called as a witness on behalf of the plaintiff, testified in substance that he was employed by the plaintiff as outside man in charge of the wharf and as special officer on its premises, and had been so employed since April, 1896; that, when he first came to the wharf, there was a float about thirty by forty feet in size and so constructed that it would rise and fall with the tide, maintained for a landing, with a flight of steps leading to the platform on the wharf; that at the time of the big storm about Thanksgiving, 1898, which wrecked the Portland, the float was damaged and was towed off and never was brought back; that from that time the only way any person could land there from small boats or crafts was by bringing a ladder with them or climbing up a slimy pile if it was low water, but at high water they could jump on to the wharf; that the tide rose and fell at that point from eight to ten feet; that the piles of the wharf were from about ten inches to a foot in diameter.

He further testified that between December 1, 1901, and December 1, 1903, he had seen boats land there with junk, had seen parties land there from launches, and that boats made the same use of the landing that they did when there was a float there.

The counsel for the plaintiff then asked the witness whether or not any charge was made for landing on the platform between December 1, 1901, and December 1, 1903, and also whether any charge was made after December 1, 1903. These questions were asked for the purpose of bringing out evidence to show that the plaintiff acknowledged the city's right in the premises and did not charge for landing on the part of the wharf described in the lease to the defendant until after December 1, 1903, but did charge after that, and that charges always were made for similar use of other parts of the wharf. The judge excluded the evidence and the plaintiff excepted.

The plaintiff then called as a witness one Ballard, who testified that he had been in the employ of the plaintiff since the

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middle of April, 1902, first as bookkeeper and then as assistant wharfinger in charge of the premises, after the death of the previous wharfinger, one White, who died on April 8, 1905.

The counsel for the plaintiff then offered in evidence the ledger and cash book of the plaintiff kept by the witness and by White in the usual course of business. These books were not objected to as such, and counsel then offered to show from them payments of $250 each for rent, made by the defendant to White, the wharfinger, on March 12, 1902, August 12, 1902, October 16, 1902, January 13, 1903, April 11, 1903, and April 13, 1903.

These payments were offered as evidence of a holding over by the defendant under the covenants of the lease, and it was ruled by the judge that no authority to make the payments having been shown they were not admissible. To this ruling the plaintiff excepted.

The counsel for the plaintiff then offered in evidence the following letters which were properly identified by the witness:

"August 6, 1903.

"To the Commercial Wharf Company, a corporation duly established under the laws of Massachusetts.

"You are hereby notified that the city of Boston will, at the end of that quarter which shall begin next after this date, quit and deliver up premises on Commercial Wharf and dock, east of Atlantic Avenue in said city, heretofore used by said city for a float and public landing place.

"City of Boston,
by Patrick A. Collins, Mayor."

"August 6, 1903.

"To the Commercial Wharf Company, a corporation duly established under the laws of Massachusetts.

"You are hereby notified that the lease from your corporation to the city of Boston, dated November 30, 1891 and extended March 1897 for the term of five years from December 1, 1896, of the right to use certain floats, flats and dock between the north and south piers of Commercial Wharf in said Boston terminated at the expiration of said extended term; provided it is legally necessary so to do said lease and all liability of the city

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of Boston thereunder or for or on account of the premises therein described is hereby terminated in accordance with the provisions of said lease, the appropriation for said purpose being insufficient to meet the expense thereof.

"Very truly,
James Donovan,
Supt. of Streets of the City of Boston."

"August 6, 1908.

"To the Commercial Wharf Company, a corporation duly established under the laws of Massachusetts.

"You are hereby notified that the lease from your corporation to the city of Boston, dated November 30, 1891 and extended March 1897 for the term of five years from December 1, 1896, of the right to use certain floats, flats and dock between the north and south piers of Commercial Wharf in said Boston terminated at the expiration of said extended term. The city of Boston denies all liability to you for rent or otherwise since December 1, 1901, and hereby requests that you repay to the city all amounts paid you for said premises by said city, the same having been made under a mistake of one of the city departments and without legal authority.

"Very truly,
Patrick A. Collins,
Mayor of the City of Boston."

Each of the foregoing three letters was written on paper with the heading "City of Boston, Law Department, 73 Tremont Street, Boston, Tremont Building, Rooms 730–740."

The judge ruled that no authority to send these notices having been shown the notices were not admissible. To this ruling the plaintiff excepted.

The plaintiff then asked for certain rulings, twelve in number, which were refused by the judge, but the questions raised by such refusals were not considered by the court because the case was disposed of on other exceptions.

The judge ordered the jury to return a verdict for the defendant in each of the cases. The jury returned verdicts for the defendant as directed; and the plaintiff alleged exceptions.

B. E. Eames, for the plaintiff.

S. M. Child, for the defendant.

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SHELDON, J. No question seems to have been made but that the lease and the extension for five years from December 1, 1896, were duly executed and became binding upon the defendant. Nor was there any dispute that for any occupation of the whole or a part of the leased premises after the term of the lease, as extended, had expired, the defendant would be liable to pay rent at the rate stipulated in the lease. The question at issue was whether there had been such occupation. The defendant contends that it had abandoned the premises in November, 1898, by removing the landing float, and in no way had occupied them since that time.

The property leased to the defendant was the right to use a certain part of the plaintiff's dock and flats "for a public float and landing place for boats," and the "right to drive, cap and maintain four oak piles, one at each corner of said float, to keep the same in position; also the right to build a platform" from one side of the pier "and a run or other suitable approach" from the platform to the float, "and to drive such piles as may be necessary in building" the platform and approach. The defendant did all these things.

The mere removal of the float by the defendant in November, 1898, for repairs, all its other erections having been left there, did not constitute an abandonment, even though it never was brought back. Nor was anything further done upon the expiration of the extended term, December 1, 1901. The other erections made by the defendant were not removed, and apparently were still in position until the end of the period sued for. There also was evidence that the defendant had put a notice upon the premises, purporting to be signed by the superintendent of streets, reading, "City of Boston Public Landing. Boats not allowed to tie up here"; and that this remained in position until after the expiration of the period sued for. No notice of any kind was given by the defendant of its abandonment of the leased premises. It is true that no notice was required to terminate the tenancy at the expiration of the lease; but in view of the other facts of the case this failure to give notice might have some significance. Under these circumstances we are of opinion that the plaintiff should have been allowed, if it could do so, to show the declarations of White, its deceased wharfinger, contained in

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entries in the books kept by him, that payments of rent for these premises had been made by the defendant after the expiration of the lease up to April, 1903. The books which were offered to show these declarations were not objected to as such; and they appear to have been excluded simply because no authority from the city to make the alleged payments had been shown. But the offer was to show that the payments were made by the city; the contents of the books are not before us; and we cannot suppose that the payments purporting to be made were made through merely inferior officers of the defendant city. If made by the mayor and treasurer, or either of them, the presumption *omnia rite esse acta* would apply. *Washington National Bank* v. *Williams*, 190 Mass. 497. The mayor is the chief executive officer of the city. *Nichols* v. *Boston*, 98 Mass. 39. The treasurer is the person charged with its financial affairs and the responsibility for its moneys. Apparently the whole matter of this lease and its extensions had been attended to from the beginning by the mayor; and evidence of his actions in the matter was *prima facie* competent. *Davies* v. *Mayor of New York*, 93 N. Y. 250. Such evidence was received and acted upon against the same objection in *St. Louis Gas Light Co.* v. *St. Louis*, 11 Mo. App. 55, 74, 75, upon the presumption of right acting which attends the conduct of every person in an official station until the contrary is shown. *Read* v. *Sutton*, 2 Cush. 115. *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, 69, 70. *United States* v. *Adams*, 24 Fed. Rep. 348. *Mandeville* v. *Reynolds*, 68 N. Y. 528, 534.

It must be remembered that this is a question of merely private right, in which no governmental function is to be dealt with, and the liability of the defendant is to be determined, as that of any citizen would be, by the contract which it has made. *Boston Molasses Co.* v. *Commonwealth*, 193 Mass. 387. *Chicago* v. *Sexton*, 115 Ill. 230. It is not denied that if such payments were made after the term of the extended lease had expired this would furnish some evidence of a holding over by the defendant; and there was no assertion of any act of abandonment or surrender during the period sued for after the time covered by the payments.

For the same reasons, the letter written by the mayor, dated

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August 6, 1903, should have been admitted. It was of course open to explanation; but it tended to show that the city was holding over when the letter was written. *Blanchard* v. *Blackstone*, 102 Mass. 343, 348. *O'Leary* v. *Board of Education*, 93 N. Y. 1. 1 Dillon, Mun. Corp. (4th ed.) § 305, note. In connection with the other evidence, it was competent for the plaintiff to show that it had recognized the alleged occupation of the city by refraining from making any charge for landing upon the platform constructed by the city under the lease.

It is not necessary to consider the requests for rulings in detail. The liability of the defendant depended upon whether it actually had occupied any part of the leased premises during the period sued for; and this presents a question of fact to be determined by the jury.

Exceptions sustained.

MICHAEL J. CONROY *vs.* G. W. AND F. SMITH IRON COMPANY.

Suffolk. January 18, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence.

In an action by an employee of a construction company, engaged in doing the mason work for a large coal pocket, against an iron company, engaged at the same time in doing the iron work for the same coal pocket, for personal injuries from an iron beam falling upon him when it was being hoisted by means of a derrick furnished and operated by the plaintiff's employer, if there is evidence that the defendant's foreman wished to use the iron beam and fastened it to the chain to be hoisted and that the accident was due to his negligence in selecting a chain which manifestly was unfitted for this work, although proper ropes for holding the beam had been provided by the plaintiff's employer, and in adopting an improper method of fastening the beam to the chain, and there also is evidence that the defendant's foreman, in fastening the beam to the chain was acting for the defendant and within the scope of his employment, there being no contention that the plaintiff was not in the exercise of due care, the question of the defendant's liability is for the jury.

In an action by an employee of a construction company, engaged in doing the mason work for a large coal pocket, against an iron company, engaged at the same time in doing the iron work for the same coal pocket, for personal injuries

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from an iron beam falling upon him when it was being hoisted by means of a derrick furnished and operated by the plaintiff's employer, there was evidence that the defendant's foreman, who was in charge of the iron work at the coal pocket and whose duty it was to select the iron beams for hoisting, attached the beam to the derrick by a chain which was an improper one for the purpose, that there were ropes called straps at hand, the purpose of which was to fasten a beam that was too small for the chain as this one was, and that the defendant's foreman made no use of these ropes. The foreman testified that, being desirous of having this beam hoisted, he told the tag man of the plaintiff's employer who was in charge of the derrick that he wanted the beam, that the tag man told him he was busy but that if the defendant's foreman "would hook on to the beam" he would hoist it for him, that the foreman then put the chain around the beam, and, while attempting to take two turns with the chain, told the tag man that he did not have chain enough and asked him to give him more, but that the tag man said that there was chain enough, that one turn was enough to put around the beam and refused to give him more chain, that thereupon the foreman took one turn around the beam, fastened the hook and said, "Go ahead," whereupon the tag man signalled to the engineer to hoist, that the engineer obeyed the order and the beam slipped from the chain and fell on the plaintiff. The judge, among other instructions, instructed the jury that if they found that the defendant's foreman asked for more chain and that the tag man of the plaintiff's employer did not give it to him and said that one turn was enough that would not be an excuse for the defendant's foreman. *Held*, that this instruction was correct, as, if the accident was due to the negligence of the defendant's servant or agent, the concurring negligence of the other contractor, if proved, would constitute no defence to the action.

TORT against the G. W. and F. Smith Iron Company for personal injuries while in the employ of the Morrill and Whiton Construction Company. Writ dated November 20, 1902.

On October 10, 1902, the same plaintiff brought an action against the Morrill and Whiton Construction Company, and the two cases were tried together in the Superior Court before *Holmes*, J.

The plaintiff offered evidence tending to show that he was injured at about ten o'clock in the forenoon of December 5, 1901. The defendant and the Morrill and Whiton Company were engaged in building a coal pocket at the State House in Boston, the construction company doing the mason work and the defendant doing the iron work. The plaintiff was about twenty-six years of age at the time of the accident and had been employed by the Morrill and Whiton Company about six months and upon this particular work about three weeks.

Upon the premises at the time of the accident were three derricks furnished by the Morrill and Whiton Company. Each of these derricks was provided with an engineer and a tag

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man. By means of these derricks all the hoisting was done which was necessary to be done in the construction of the coal pocket. None of the workmen operating the derricks were employees of the defendant. At the time of the accident the plaintiff was at work near one of the derricks, and while he was so at work an iron beam about six feet in length weighing about one hundred pounds fell upon him, causing the injuries sued for. The evidence tended to show that the Morrill and Whiton Company provided a chain for the purpose of hoisting different kinds of material.

The plaintiff testified that he had worked as a stone and brick mason for about eleven years before the accident; that at the time of the trial in 1906 he was thirty-one years of age; that at the time of the accident he was laying a stone for the Morrill and Whiton Company; that he did not see the iron beam which struck him; that he had been working in the coal pocket about three weeks; that the derrick which hoisted the iron beams was in the centre of the coal pocket; that iron beams were scattered around in the bottom of the coal pocket; and that one Sears was the foreman for the defendant; that Sears did all the iron work there and was foreman over the iron workers that were there; that the plaintiff had seen him pick out the iron and tell "the tag man or whoever it was" where to go with it. He further testified that he had seen Sears hitch on iron beams before the accident; that he had seen him hitch on iron beams sometimes three or four times in a half hour and sometimes not for a couple of hours; that Sears had been doing this every day for about a month; that the iron men took orders from Sears; and that he had never heard any one give orders to Sears.

On cross-examination he testified that his people did the hoisting; that they furnished the derricks and had an engineer and tag men for the different derricks, and that the derrick was working nearly all day hoisting things; that one Olson did the work of tagging on the derrick which caused the accident; and that he heard the order given to the engineer by Olson before the accident happened. He further testified that Sears would go down from above, pick out the iron beams, put the chain on and tell them to hoist; that he had seen Sears make the hitch on I-beams.

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On re-direct examination the plaintiff testified that he had never seen beams hoisted over the heads of workmen with only one turn of the chain around the beam; that the times when only one turn was used were when the beams were being lowered into the pit from the wagons; that this was always at the farther end of the pit from where the masons were working; that it was customary for the tag man to call out "heads up" when a beam was about to be hoisted over the heads of the workmen; that at the time of his accident no call or warning was given and he did not know that a beam was being hoisted; that he had his back toward the part of the pit where the beams were kept, and knew nothing about the approach of the beam until after it struck him.

Olson, called by the plaintiff, testified that he was in the employ of the Morrill and Whiton Company and was tag man on the derrick which was hoisting the iron beam that fell upon the plaintiff; that the beam was slippery; that there was ice on it and that it was newly painted; that Sears made the hitch around the iron beam; that in making the hitch the chain was passed around the beam once and the hook on the end of the chain hooked into that portion of the chain which ran from the tackle block on the derrick to the beam; that when the hitch was made Sears sang out to Olson "Go ahead"; that thereupon Olson signalled to the engineer to hoist; that the engineer obeyed the signal and hoisted the beam, and that while the beam was hoisting it slipped from the chain and fell.

The chain provided by the Morrill and Whiton Company for the purpose of hoisting the beam was made of links three inches in length. Testimony of two experts and of the father of the plaintiff was introduced by the plaintiff to the effect that the chain was an improper chain for the purposes to which it was put at the time of the accident in that the links were too long and would not sufficiently bind upon the beam while hoisting. The chain was provided by the Morrill and Whiton Company and none of the hoisting apparatus was provided in any way by the defendant.

One Prendergast, called by the plaintiff, testified that he had been an iron worker and rigger for nineteen years; that at the time of the accident he was operating one of the two derricks in

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the coal pocket; that he was standing about forty feet from the plaintiff; that he saw the beam which struck the plaintiff as it was in the air; that it was fastened with a single hitch; that he saw Sears give orders where to put the iron, where to place it and what beam to hitch on to it; that Sears picked out the iron; that he had seen him hitch on iron beams.

Being asked whether there were any ropes or what are called straps on or near that coal pocket on the day of the accident, he answered that "there were lots of straps there"; that there were half a dozen straps; that the use or purpose of these straps was "to hitch on to such a load as that beam, that was too small for a chain." He further testified that the defendant put in the beams; that they were hoisted under the direction of Sears; that no one else ever gave any orders for the hoisting of the beams; and that Sears put hitches on the beams.

Sears, called by the defendant, testified that at the time of the accident he had been at work upon the job several days and had charge of the putting in place of the iron beams in behalf of the defendant; that all the hoisting was done by the Morrill and Whiton Company and that before the day of the accident Sears would point out to the tag man such beams as he desired to have hoisted and that the tag man would make a hitch around the beams and hoist them to such place as was designated by Sears; that before the accident Sears had never placed a chain around any of the I-beams; that upon the day of the accident the tag man Olson was upon the bank; that Sears was desirous of having the I-beam hoisted; that he told Olson that he wanted the beam; that Olson said that he was in a hurry and that if he, Sears, would hook on to the beam he, Olson, would hoist it for him; that Sears then put the chain around the I-beam and while attempting to take two turns with the chain told Olson that he did not have chain enough and asked him to give him more, but that Olson said that there was chain enough, that one turn was enough to put around the beam and refused to give him more chain, that thereupon Sears took one turn around the I-beam, fastened the hook and said "Go ahead." Sears further testified that for several days before the accident the employees of the Morrill and Whiton Company were unable because of the weather to do any mason work; that upon the day of the acci-

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dent the weather was fit for laying brick and stone, and that the tag man Olson and the employees of the Morrill and Whiton Company were hurried about their work.

On cross-examination Sears stated that while upon the work he had given no instructions or orders in regard to hoisting; that he put on the single hitch because the tag man would give him no more chain, and that he wanted to take two turns as an extra precaution. He further testified that the chain used upon the day of the accident was the only chain provided by the Morrill and Whiton Company and that no sling or strap was seen by him at any time upon the premises.

Olson, called in rebuttal by the plaintiff, testified that he did not tell Sears that one turn around the iron beam was enough, and that he did not refuse to give Sears more chain.

At the close of the evidence the defendant asked the judge to rule that upon all the evidence the plaintiff was not entitled to recover against it. The judge refused to make this ruling, and submitted the case to the jury, and, among other instructions, instructed them in substance that if they found that Sears asked for more chain and that Olson did not give it to him, refused to give it to him and said that one turn was enough, that would not be an excuse for Sears.

The judge also gave the following instructions which were requested by the plaintiff:

"1. If the jury believe that the iron beam was fastened by the defendant's agents or servants in a negligent way, and that it slipped or fell by reason of such negligent fastening, this would warrant the jury in finding that the defendant was negligent.

"2. If the negligence of the defendant's servants or agents was an adequate cause of the accident, the concurring negligence of persons other than the plaintiff himself constitutes no defence to this action.

"3. The jury may find that Sears acted within the scope of his employment in 'slinging' the iron beams at the time of the accident if they believe that Sears was the defendant's foreman at the coal pit and did the slinging of the iron beam for the purpose of performing the defendant's work or contract and not for some private purpose of his own.

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"5. If the jury find that Sears was the defendant's foreman at the coal pit at the time of the accident and had charge of the iron beams, and authority to designate the particular iron beam to be next hoisted into place by the derrick and to see that the iron beam was put into its proper position, and that he did the slinging of the beam which fell and struck the plaintiff, for the purpose of performing the defendant's work or contract, the jury would be warranted in finding that Sears was acting within the scope of his employment at the time of the accident."

The jury returned a verdict for the plaintiff in the sum of $3,550; and the defendant alleged exceptions to the rulings of the judge and to his refusal to order a verdict for the defendant.

The criticisms by the defendant's counsel of the instructions to the jury and the cases cited by him, which are referred to in the last paragraph of the opinion, were as follows:

The judge, in substance, instructed the jury that even if Sears, as he testified, asked Olson for more chain, and Olson refused to give it to him, and said that one turn was enough, this would not excuse Sears, and that the jury still might find him negligent. This the defendant submits was a prejudicial error. When Sears asked Olson for more chain and the latter had refused to furnish it, and had failed to make use of the straps or ropes that were furnished, there was nothing more that Sears could do but go ahead with the hoisting. His conduct in doing so was not only reasonable but was the only practical course open to him.

Sears had a right to rely on the knowledge and judgment of Olson as the one in charge of the derrick. It was Olson's duty to have oversight of the hoisting appliances, and the defendant's employees had a right to rely on his performance of that duty. Therefore, when he said that one turn of the chain was enough and refused to give more or to provide any other means for fastening the beam, Sears was entitled to accept this as proper and go ahead. From the method of work adopted, on Sears's evidence, as far as the hoisting was concerned, he was in the same position as a subordinate to the Morrill and Whiton men. He stands, therefore, in exactly the same position as an ordinary employee, who is entitled to assume that his superintendent or employer is taking the proper precautions required for the pro-

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tection of his men. *McKinnon* v. *Riter-Conley Manuf. Co.* 186 Mass. 155. *Bartholomeo* v. *McKnight*, 178 Mass. 242. *Burgess* v. *Davis Sulphur Ore Co.* 165 Mass. 71. *Lynch* v. *Allyn*, 160 Mass. 248.

It follows, therefore, that on these facts the defendant was entitled to instructions that if Sears's story was believed he was not negligent and the plaintiff was not in such case entitled to recover against this defendant. The instructions excepted to allowed the jury to find Sears negligent, even if they believed his story. They therefore were erroneous.

W. I. Badger, for the defendant.

C. Reno, for the plaintiff.

SHELDON, J. On the evidence a verdict could not have been ordered for the defendant.

The jury had a right to find that the work of hoisting the beams was done under the direction of Sears, the defendant's foreman; that the accident was due to his negligence in selecting a chain which manifestly was unfit for this work, although proper straps for the purpose had been provided by the other contractor, and to find that there was negligence in the manner which he adopted of fastening the beam to the chain; and that in what he did he was acting for the defendant and within the scope of his employment. This issue was submitted to the jury with proper instructions, and they were expressly told that if the defendant was not concerned in the hoisting of the beam, and if what Sears did was merely a voluntary performance by him of part of the work of the Morrill and Whiton Company, then the defendant would not be liable. The jury have passed upon this question, and we cannot revise their finding. See *Hale* v. *New York, New Haven, & Hartford Railroad*, 190 Mass. 84; *Melvin* v. *Pennsylvania Steel Co.* 180 Mass. 196. It has not been argued that the plaintiff was not himself in the exercise of due care. *Meagher* v. *Crawford Laundry Machinery Co.* 187 Mass. 586. *Smith* v. *Baker*, [1891] A. C. 325.

Nor do we find any error in the specific instructions that were given. If this accident was due to the negligence of the defendant's servant or agent, the concurring negligence of the other contractor, if proved, would constitute no defence to this action. *Butler* v. *New England Structural Co.* 191 Mass. 397, 401.

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Oulighan v. *Butler*, 189 Mass. 287, 292. *Murray* v. *Boston Ice Co.* 180 Mass. 165, 168. *Boston Woven Hose & Rubber Co.* v. *Kendall*, 178 Mass. 232, 236, 237.

The instructions given required the jury, in order to return a verdict for the plaintiff, to find that Sears was acting within the scope of his employment by the defendant, and in no way had become the servant of the Morrill and Whiton Company. The criticisms made upon them by the defendant's counsel are not well founded, and the decisions cited by him are not applicable to the facts settled by the jury.

Exceptions overruled.

MICHAEL J. CONROY *vs.* MORRILL AND WHITON CONSTRUCTION COMPANY.

Suffolk. January 18, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability.

In an action by a mason against his employer, a corporation engaged in doing the mason work for a large coal pocket, for personal injuries from an iron beam falling upon him while being hoisted by means of a derrick maintained and operated by the defendant, if it appears that the accident was due to the negligence of a foreman of another corporation, which was doing the iron work for the coal pocket, in fastening the iron beam to the fall of the derrick with a chain which was intended to be used for heavier beams and was too large and inflexible to "bind" and hold the small beam that was being hoisted, and it also appears that the chain was suitable for some of the hoisting that was to be done and that the defendant provided proper straps and slings for the hoisting of small beams like the one that slipped through the chain and fell on the plaintiff, there is no evidence of negligence on the part of the defendant.

TORT for personal injuries incurred while in the employ of the defendant, a corporation engaged in doing the mason work of a coal pocket which was being constructed at the State House in Boston. Writ dated October 10, 1902.

In the Superior Court the case was tried before *Holmes*, J. together with an action brought by the same plaintiff against the G. W. and F. Smith Iron Company, which so far as material to

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the exceptions in that case is described *ante*, 468. The accident happened about ten o'clock in the forenoon of December 5, 1901. The plaintiff, an experienced mason about twenty-six years of age, had been employed by the defendant about six months and had been working in the coal pocket about three weeks.

At the time of the accident the Smith Iron Company was hoisting an iron beam six feet long and weighing about one hundred pounds into position by means of a derrick erected near the centre of the coal pocket, which was at the time an excavation about one hundred feet square and twenty feet deep. One Sears, the foreman of the Smith Iron Company, had fastened the beam to the fall of the derrick by means of an iron chain, and while the beam was being hoisted to its place at the top of the coal pocket it slipped through the chain, fell and struck the plaintiff who was working in the construction of the wall of the coal pocket.

The plaintiff testified that at the time of the accident he was laying a stone for the defendant; that he did not see the iron beam which struck him; that the derrick which hoisted the iron beams was in the centre of the coal pocket; that iron beams were scattered around the bottom of the coal pocket; that Sears was the foreman for the Smith Iron Company; that Sears did all the iron work there and was the foreman over the iron workers; and that he had seen him pick out the iron and tell "the tag man or whoever it was" where to go with it. He further testified that he had seen him hitch on iron beams before the accident; that he had seen him hitch on iron beams sometimes three or four times in a half hour and sometimes not for a couple of hours; that Sears had been doing this every day for about a month; that the iron men took orders from Sears; and that he had never heard any one give orders to Sears; that employees of the defendant had never hitched on iron beams; and that one Olson, the tag man on the derrick, gave the order to the engineer before the accident happened.

He further testified that Sears would go down from above, pick out the iron beams, put the chain on and tell them to hoist; that he saw Sears make the hitch on I-beams; that sometimes he would use a strap; that Sears often would make two turns and sometimes one turn around the beams.

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One Prendergast, called by the plaintiff, testified that he had been an iron worker and rigger for nineteen years; that at the time of the accident he was operating one of the two derricks in the coal pocket; that he was standing about forty feet from the plaintiff; that he saw the beam which struck the plaintiff as it was in the air; that it was fastened with a single hitch; that he saw Sears give orders where to put the iron, where to place it and what beam to hitch on to it; that Sears picked out the iron; that he had seen him hitch on iron beams; that the iron beam which struck the plaintiff was about six feet long, six inches high and had flanges at the top and bottom about four inches wide; that the beam probably weighed about two hundred pounds; that the iron chain was a large chain capable of raising seven tons; that its links were about three inches long and seven eighths of an inch in diameter; that there were half a dozen straps on the premises and that the use or purpose of those straps was to hitch on to such a load as that beam, which was too small for a chain; that those straps or ropes were used for small beams; that he had seen Sears make hitches on the iron beams.

Olson, called by the plaintiff, testified that at the time of the accident he was a rigger and iron worker for the defendant; that he was a tag man on the derrick which hoisted the iron beam that caused the accident; that he saw Sears make the hitch on the iron beam which hit the plaintiff; that Sears made a single hitch; that no boards were put on the beam before the hitch was made; that there were straps or ropes on the premises at the time of the accident; that these were used for hoisting small iron beams; that the chain on the end of the fall was about fifteen feet long; that after Sears made the hitch he told the witness to go ahead; that no one but Sears had anything to do with making the hitch; that there was ice on the beam. He testified that the Smith Iron Company did all the iron work; that he never made a hitch on the iron beams; that it always was made by the Smith people. He further testified that at the time of the accident there were slings upon the premises; that there were some in the cellar and some in the locker; that these slings had been used on short beams the day before the accident; that he had seen Sears take one turn before the day of the accident;

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that he could see Sears make the single hitch; that he had been a tag man fifteen or sixteen years. On cross-examination he testified that whenever he hoisted iron beams he acted under the orders of Sears; that he never hoisted iron beams under the direction of the foreman of the defendant; that Sears always gave orders in regard to the iron work; that he had seen all the iron put in and that the defendant had nothing to do with the iron work.

At the close of the plaintiff's evidence the defendant rested its case, and the G. W. and F. Smith Iron Company proceeded to introduce evidence in defence of the case against that company. At the close of all the evidence the defendant asked the judge to order a verdict for it. This the judge refused to do, and submitted the case to the jury, instructing them that the defendant was not to be affected at all by the evidence put in after it had rested its case. The jury returned a verdict for the plaintiff in the sum of $3,550; and the defendant alleged exceptions.

J. Lowell & J. A. Lowell, for the defendant.

C. Reno, for the plaintiff.

SHELDON, J. This case was argued with the case of the same plaintiff against the G. W. and F. Smith Iron Company, *ante*, 468, but presents somewhat different questions. The defendant rested at the end of the plaintiff's case, and excepted to the refusal of the presiding judge to order a verdict in its favor, and this presents the only question.

The plaintiff's only contention as to negligence of the defendant is that there was evidence that the iron chain furnished by the defendant for hoisting the beams was unsafe and unsuitable for use with the small beam which fell and caused the accident, for the reason that the chain was too large and heavy and inflexible to "bind" and afford sufficient frictional resistance to hold the beam while being hoisted. There was evidence that this was the case; but it also appears, and we do not understand it to be disputed by the plaintiff, that this chain was proper and suitable to be used for some of the hoisting to be done, and that the defendant provided proper straps and slings for the hoisting of small beams like the one in question. It cannot be said to be negligence in the defendant that it provided suitable and different chains and appliances for the hoisting of heavy and light

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weights, if each instrumentality that it provided was suitable for the work which it was intended to do; and we find no evidence that this was not the case. The accident was not due to any negligence of the defendant in furnishing an improper appliance, as in the cases relied on by the plaintiff. *Ford* v. *Eastern Bridge & Structural Co.* 193 Mass. 89. *Carroll* v. *Metropolitan Coal Co.* 189 Mass. 159. *Arnold* v. *Harrington Cutlery Co.* 189 Mass. 547. *White* v. *Perry Co.* 190 Mass. 99. *Kalleck* v. *Deering*, 169 Mass. 200. *Mowbray* v. *Merryweather*, [1895] 1 Q. B. 857. The negligence from which the plaintiff suffered was the act of Sears in selecting from the proper appliances furnished by the defendant one which was not adapted for this particular piece of work; and the plaintiff has not argued that Sears was in any sense acting for the defendant. No doubt, if the defendant had been guilty of the negligence complained of, it could not be said as a matter of law that the intervening negligence of Sears would have relieved it from liability, *Conroy* v. *Smith Iron Co.*, *ante*, 468; but there was no evidence upon which this could have been found. It is not necessary to examine the cases in which a master who has furnished both proper and improper tools or appliances has been held not to be liable for injury occasioned to a servant by a fellow servant's negligent selection of an improper one for use. See *Wolfe* v. *New Bedford Cordage Co.* 189 Mass. 591; *Morrison* v. *Whittier Machine Co.* 184 Mass. 39; *Hayes* v. *New York, New Haven, & Hartford Railroad*, 187 Mass. 182, 183, 184; *Miller* v. *New York, New Haven, & Hartford Railroad*, 175 Mass. 363; *Young* v. *Boston & Maine Railroad*, 168 Mass. 219; *McKinnon* v. *Norcross*, 148 Mass. 533; *Johnson* v. *Boston Tow-Boat Co.* 185 Mass. 209.

We are of opinion that a verdict should have been ordered for the defendant; and it is unnecessary to consider any of the other questions presented.

Exceptions sustained.

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JULIA F. ROAK *vs.* JENNIE DAVIS.

Suffolk. January 18, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Equitable Restrictions. Equity Jurisdiction, To enforce restriction on land.

In order that an owner of land should be bound by restrictions, not contained in his deed or in those of his predecessors in title, which were imposed on other lots by a former owner of his land, it is necessary to show that when he bought the land he had notice of the restrictions and also to show that none of his predecessors in title since the restrictions existed bought without notice of them so as to convey a title free from restrictions.

Where a landowner, selling lots according to a plan which shows twenty-two lots adjoining and opposite each other on a certain street but contains nothing indicating restrictions, conveys four of the lots by deeds containing certain like restrictions, and gives another deed and a mortgage; and his successor in title gives a deed, containing restrictions which are similar to the former ones but differ in details, these conveyances do not show the adoption of a general scheme for the lots on the street shown on the plan which prevents the conveyance of the remaining lots on any terms which seem desirable to the owner, and it is immaterial whether or not purchasers of the remaining lots who take deeds without restrictions have notice of the restrictions in the deeds previously made.

LORING, J. This is a bill by the owner of lot 6 on the plan printed on page 482 to enjoin the defendant, who is the owner of lots 21, 22 and 23 and of parts of lots 20 and 24, from erecting within one foot of the street lines two blocks of apartment houses, each for three families, on the ground that one Patrick Maguire, while owner of the whole tract, adopted a general scheme for its development which is violated by the erection of these houses.

The plaintiff's lot was conveyed to her by Patrick Maguire by a deed dated October 30, 1894. This deed contained the following clause: "This conveyance is made . . . subject . . . to the following restrictions viz: No building other than a single dwelling house for one family and to cost not less than six thousand (6000) dollars exclusive of the cost of the land shall be erected on this lot. The front line of the building shall be not less than fifteen (15) feet back from the Street; but porticoes,

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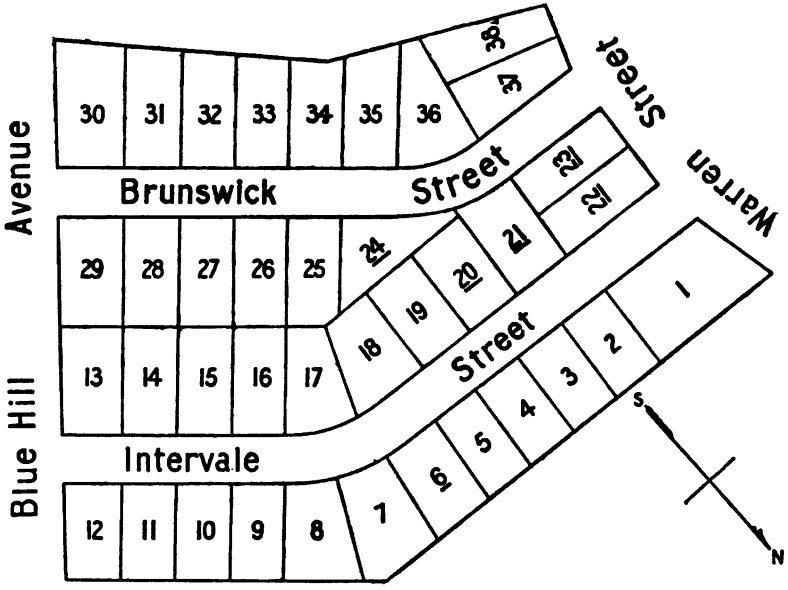
bay windows and piazzas may project over said front line but not more than within six (6) feet of the Street. These restrictions shall continue till the year 1900." We assume that 1900 in the copy of this deed is a misprint for 1910.

Maguire seems to have died in 1896 or after, although the only witness who testified to his death said that he died in 1895.

The land afterwards conveyed to the defendant and other land in the neighborhood was devised or descended (it is stated both ways in the evidence) to his daughter Annie Maguire, who is



alleged in the bill to have conveyed to one Rudnick sixteen lots, to wit, lots 14 to 29, inclusive. It is also alleged in the bill that Rudnick, on February 19, 1906, conveyed to the defendant the lots and parts of lots here in question. These deeds were not put in evidence. It was assumed at the trial that they contained no restrictions, and we shall proceed on that assumption.

In proof of the allegation that Patrick Maguire in his lifetime adopted a general scheme for the development of this tract of land, the plaintiff introduced in evidence the plan, already referred to and printed above, which Patrick caused to be made in 1892, and deeds of three lots, to wit, lots 4, 9 and 11, dated

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September 8, 1893, July 30, 1894, and May 7, 1895, respectively. All of these deeds contained the restrictions set forth in the deed to the plaintiff.

The plaintiff also introduced a deed by Patrick of lot 12, dated October 10, 1896, in which so far as the evidence goes there were no restrictions at all. In that deed it was stated that the land was conveyed "subject to the restrictions contained in" a mortgage deed to the Union Institution for Savings. But there was no evidence as to what, if any, restrictions were contained in that mortgage. The plaintiff also put in evidence a mortgage of one lot and deeds of two lots on another plan not made part of the record, which was assumed at the trial to have been a plan made in 1895 of the same territory; and we shall proceed on that assumption.

This mortgage was dated January 22, 1896, and was signed by Patrick; and the deed signed by him was dated February 10, 1896. The other deed is dated October 17, 1898, and is executed by Annie Maguire. This mortgage and these two deeds also contain restrictions expiring in 1910. The restrictions in this mortgage and in these two deeds are similar but somewhat different from those in the deed to the plaintiff and in the other three deeds above referred to. The differences consist in requiring the cost of the house to be $5,000 in place of $6,000, in not forbidding porticoes, bay windows and piazzas to be built within six feet of the street line, and in allowing front steps to protrude into the reserved space in front of the houses. Further, in the Annie Maguire deed the set back is twenty in place of fifteen feet.

The plaintiff also put in evidence tending to show that Patrick orally promised the plaintiff that there would be as good houses on the other side of the street or, as the plaintiff's husband put it, that "I could take his word that those houses would be just as good on the opposite side of the street as what the house I was buying. I don't know as he said they would be restricted; I don't know as he answered that question."

The plaintiff's evidence in addition consisted of the fact that sewers were laid in the street with Y branches for each, or for nearly each, lot; and of general statements made by Patrick that he intended to cut up the land into lots suitable for single dwelling houses, and that it would be restricted to that. There

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was also proof of a caveat in the registry of deeds by the owner of lot 3, dated June 24, 1901, giving notice of a bill in equity brought against Annie Maguire affecting the use of lots 13 to 19, on which bill a decree was entered at a time not stated, dismissing the bill.

On this evidence the judge who heard the case in the Superior Court entered a decree dismissing the bill, and the case is before us on an appeal from this decree on all the evidence without any finding of fact.

To make out her case here the plaintiff had to prove that Patrick Maguire or Annie Maguire, or both, had in fact put on the land not sold when Annie sold to Rudnick equitable restrictions which would be violated by the erection of the defendant's buildings, so that she was not at liberty to sell the unsold land free from those restrictions; and that Rudnick and the defendant took with notice of that fact.

If the judge believed the plaintiff's husband, Patrick Maguire refused to restrict the remaining land when he sold to the plaintiff, and told her that she would have to take his word for the opposite land having single houses on it. That would bring this case within the rule of *Dickinson* v. *Todd*, 172 Mass. 183, and similar cases.

But if we should find that Patrick intended to restrict this whole area and that he stated to some purchasers that he had that intention, the plaintiff has failed to make out a case here; and it is more satisfactory to consider this by reason of the fact that during the trial the judge intimated and the defendant's counsel conceded that the evidence tended to prove that fact. Passing by the difficulty of the statute of frauds arising from the fact that this was by word of mouth and the further difficulty that the evidence did not disclose just what these restrictions were to consist of, it is enough to say that this was not brought home to Rudnick and the defendant. We say to both Rudnick and the defendant, because if Rudnick took without notice he could and did convey his title to the defendant. And if Rudnick had taken with notice, the defendant would not take subject to the restriction if she took from Rudnick without notice.

The most that the plaintiff can claim here is that Rudnick

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and the defendant are chargeable with notice of the five deeds and of the one mortgage made by Patrick and of the one deed made by Annie, and of the plans referred to therein. We do not find it necessary to decide whether Rudnick and the defendant were chargeable with notice of these deeds and plans. For if they were chargeable with notice of these deeds and plans they did not make out the adoption of a scheme by Patrick or Annie, or both.

As we have said, but one of those plans has been made part of the record before us. There is nothing on that plan which even indicates a general scheme of restrictions. On the contrary the plan, so far as it goes, indicates that the houses were not to be set back from the street lines.

The five deeds and one mortgage made by Patrick did not show the adoption of a general scheme which was binding on the land left unsold. Three of Patrick's deeds to other persons contained the restrictions found in his deed to the plaintiff. Patrick's mortgage and his other deed and the deed executed by Annie had similar but different restrictions; and the other deed of Patrick's so far as appears had no restriction at all. It seems needless to say that these conveyances do not show the adoption of a general scheme which prevented the unsold lots being conveyed on any terms which might seem to the owner desirable.

The case comes within *McCusker* v. *Goode*, 185 Mass. 607.

Decree affirmed.

J. R. Murphy, for the plaintiff.

G. R. Swasey, for the defendant.

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ARTHUR B. CHAPIN *vs.* CITY OF LOWELL.

Suffolk. January 18, 21, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Pauper. Insane Person. Feeble-minded Person. Statute, Construction. *Words*, "Insane person," "Feeble-minded."

Infant paupers committed to and supported in the School for the Feeble-Minded are not insane persons within the meaning of R. L. c. 87, § 6, for whose support the Commonwealth must pay after January 1, 1904, under § 79 of the same chapter, and under § 120 of the same chapter the charges for such support can be recovered by the treasurer and receiver general from the city or town in which such feeble-minded paupers had a settlement.

Under R. L. c. 8, § 4, the rules as to the meaning to be given certain words in construing statutes established by § 5 of the same chapter are not to be followed if their observance would involve a construction inconsistent with the manifest intent of the Legislature, and words and phrases are to be construed according to the common and approved usage of the language except that technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law are to be construed according to such meaning.

MORTON, J. This is an action of contract by the treasurer and receiver general to recover under R. L. c. 87, § 120, for the support of two inmates of the custodial department of the Massachusetts School for the Feeble-Minded. The inmates in question were minors and paupers with their settlements in Lowell. Previous to their commitment to the School for the Feeble-Minded they had been adjudicated insane and duly committed by the Police Court of Lowell to the Danvers Insane Hospital, from which they were discharged on January 23, 1905, as unimproved mentally and in the expectation that they would be committed to the School for the Feeble-Minded, which commitment took place on the same day. In the Superior Court the case was heard upon an agreed statement of facts, and the judge found for the plaintiff. The defendant appealed.

The support for which the plaintiff seeks to recover is from January 23, 1905, to the date of the writ, and the only question is whether the provisions of R. L. c. 87, §§ 6, 79, apply; the right of recovery under R. L. c. 87, § 120, being clear upon the agreed facts unless the inmates in question are to be regarded as

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insane persons for whose support the Commonwealth is made liable since January 1, 1904. It is the contention of the defendant that they are to be so regarded. It is manifest that they were not supported as insane persons, but as feeble-minded persons; and it is to be assumed that the proceedings for their discharge from the Insane Hospital and commitment to the School for the Feeble-Minded were undertaken in good faith and because the School for the Feeble-Minded was deemed a more suitable place for them than the Insane Hospital. The order for their commitment recites that in the case of each it has been made to appear to the judge of the Probate Court that she is a fit subject for the School for the Feeble-Minded; and the finding so made is not open to collateral attack and must be taken to mean that each comes within the class or classes for whose benefit the school was established. Otherwise the judge could not have found that they were fit subjects for the School. Unless therefore the School for the Feeble-Minded is to be regarded as an institution for the insane so that those who are committed to it come fairly within the description of insane persons the plaintiff must prevail.

As originally incorporated it was designated the "Massachusetts School for Idiotic and Feeble-Minded Youth" (St. 1850, c. 150), and continued to be so known till 1883 when the name was changed to the "Massachusetts School for the Feeble-Minded" (St. 1883, c. 239), which has been its name ever since. It is manifest, we think, from an examination of the different acts and resolves relating to it that it was not established and has not been maintained as an institution for the insane, but, as its former and present name implies, for the benefit of the idiotic and feeble-minded. St. 1850, c. 150. Res. 1851, c. 44. Res. 1861, c. 26. Res. 1869, c. 9. St. 1878, c. 126. Pub. Sts. c. 87, §§ 55, 56. St. 1883, c. 239. St. 1884, c. 88. St. 1886, c. 298. R. L. c. 87, §§ 113–123. There is nothing in any of these acts and resolves which recognizes the school as an institution for the insane, or which recognizes its inmates as insane persons. On the contrary, in the first act, which provided for a judicial commitment, idiots who were insane were impliedly excluded, and a distinction thus recognized between insanity and idiocy. This act was repealed by St. 1886, c. 298, but the effect of that was to limit

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more clearly if possible the inmates of the school to the feeble-minded. There are other statutes in which the word "feeble-minded" has been used in a sense that does not include the insane, (St. 1905, c. 475, § 1; St. 1906, c. 309; St. 1906, c. 508; St. 1899, c. 158,) and that is not its common meaning. Moreover, by St. 1906, c. 508, a new school for the feeble-minded was established, and it was provided by § 17 that the charges for the support of the settled inmates could be recovered from the city or town of settlement as therein provided. The result would be therefore that if §§ 6 and 79 of R. L. c. 87 are construed as the defendant contends that they should be, cities and towns would be liable for the support of settled inmates in one institution, but would not be in the other. Such a result, in the absence of anything to show that the Legislature intended it, would seem to be of itself almost, if not quite, decisive against the construction contended for.

The defendant relies upon R. L. c. 8, § 5, cl. 6, which provides that in construing statutes "The words 'insane person' and 'lunatic' shall include every idiot, non compos, lunatic and insane and distracted person." But it is to be observed in the first place that "feeble-minded" persons are not included in the definition thus given of "insane persons" or "lunatics." In the next place it is provided (R. L. c. 8, § 4) that the rules of construction there adopted are not to be followed if their observance would involve a construction inconsistent with the manifest intent of the Legislature, and that words and phrases shall be construed according to the common and approved usage of the language except that technical words and such others as have acquired a peculiar meaning shall be so construed. But to construe the words "insane" and "insane persons" in R. L. c. 87, §§ 6 and 79, as including feeble-minded persons, and thus making the School for the Feeble-Minded an institution for the insane, would be contrary to the manifest intention of the Legislature and would not be according to the common and approved usage of the language, and therefore the rule of construction invoked by the defendant does not apply. This result is not affected by the fact that idiotic persons may be committed to the school. When committed they are committed not as insane persons but as feeble-minded persons.

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Notice was given to the town of Danvers and the defendant makes no objection that notice was not given to it.

Judgment affirmed.

J. G. Hill, for the defendant.

J. F. Curtis, Assistant Attorney General, for the plaintiff.

JOHN A. BACON *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. January 21, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Railroad. Negligence. Words, "Freight train."

A work train distributing ties and sand for repairing the roadbed of a railroad is not a freight train within the meaning of R. L. c. 111, § 200, requiring that every freight train shall have a brakeman upon the last car.

The fact that a work train of a railroad company is being put upon a side track and that when this has been done its engine and crew are to be used in making up an extra freight train does not make the work train a freight train while it is being put upon the side track.

TORT by a freight brakeman against the railroad company employing him for personal injuries incurred in the course of his employment. Writ dated November 21, 1903.

In the Superior Court the case was tried before *Wait*, J. No notice was given under the provisions of the employers' liability act, so that the plaintiff could recover, if at all, only at common law. It appeared that the plaintiff was injured on December 5, 1902, while working as a brakeman and a member of the crew on a work train which was being switched to a siding at Harwich; that it was a dark, sleety night, with snow six or seven inches deep; that the plaintiff was attending to the switches so that the train could pass upon the siding; that he had fixed one switch and was walking along the track to the second, from one hundred and fifty to two hundred feet distant, when the train, backing down behind him as he walked, struck him, knocked him down and ran over his arm. There was evidence that the train should

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not have followed him until he signalled it to do so and that he had not signalled, and that there was no rear brakeman nor any conductor on the train to prevent its running upon him.

The judge ordered a verdict for the defendant; and the plaintiff alleged exceptions, raising the questions stated in the opinion as well as others which the decision of the court has made immaterial.

E. V. Grabill, for the plaintiff.

J. L. Hall, for the defendant, was not called upon.

LORING, J. This being an action at common law the plaintiff had to make out negligence on the part of the corporation itself.

He contends that he did so. His argument in support of that contention is that a work train distributing ties and sand for repairing the roadbed is a freight train within R. L. c. 111, § 200, and that R. L. c. 111, § 200, was not complied with because there was at the time of the accident no brakeman on or near the rear car, and if there had been he, the plaintiff, would have been seen and not run over. But we are of opinion that a work train is not a freight train within R. L. c. 111, § 200, and the rest of the plaintiff's argument need not be considered.

His next argument is that this was not a work train because the engine and crew when they had put the work cars away were to make up an extra freight train by coupling the engine which had made part of the work train on to some freight cars which were waiting to go to or toward Boston. But this accident happened in putting the work train on the side or storage track. No freight train was or was to be made up until the work train had been put upon the side track.

Exceptions overruled.

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MARGARET MADDEN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 21, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence. Street Railway.

If a woman after alighting from an electric car goes around the back of it and attempts to cross the parallel track in front of a car which she sees approaching on that track "rather fast" a little more than a car length away, thinking that she has plenty of time to get across and relying on the expectation that the motorman will lessen the speed of the car, and deciding to "chance it," she is not in the exercise of due care, and if she is knocked down by the car she cannot recover from the company operating it for injuries thus caused, even if the motorman was negligent.

TORT for personal injuries from being struck by an incoming electric car of the defendant on Washington Street in Boston after alighting from an outgoing car. Writ dated November 15, 1901.

In the Superior Court the case was tried before *Bishop*, J. The plaintiff was about sixty years of age. She testified that on May 23, 1901, she was a passenger upon an outbound open car of the defendant and was going to the Pope's Jubilee in the Cathedral on Washington Street; that the car stopped at Union Park Street, the stopping place for the Cathedral, and the plaintiff got off; that she got off on the right hand side and went right around the rear end of the car. She described the accident as follows: "I come round the rear end of the car and stepped into the space between, looked up and saw this car. I came round the rear end of the car and stepped into the space and saw the car a little distance and I thought I had plenty of time to step over. People commenced to screech and scream and I got kind of confused and the next thing I knew the car was right up on me and pitched me."

On cross-examination the plaintiff said that she used to go to the Cathedral frequently and used to go the same way by car; that she was familiar with the way there and the way the cars ran, and that she always used to get off at about the

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same place, Union Park Street, and then walked across to the Cathedral.

Other evidence is described in the opinion.

At the close of the plaintiff's evidence the judge ruled that the evidence would not warrant a verdict for the plaintiff, and ordered a verdict for the defendant, which was returned by the jury. At the request of the parties he reported the case for determination by this court. If the ruling and direction were right the verdict was to stand; otherwise it was to be set aside and a new trial was to be granted.

H. C. Long, for the plaintiff.

C. F. Choate, Jr., for the defendant, submitted a brief.

MORTON, J. It is plain, we think, that the plaintiff was not in the exercise of due care. She attempted to cross the track in front of a car which was a car length or a little more away and which was coming as she testified "rather fast," and was struck and knocked down before she got across. She testified, amongst other things, as we understand her testimony, that she thought that she had plenty of time to get across, and she relied on the motorman slowing or slackening up and she chanced it. She was familiar with the way cars ran in that locality and there was no exigency which compelled her to cross the track as she attempted to do. She "chanced it" as she testified, and as is evident was the case and as many people do under similar circumstances, and though it may be hard for her, she must take the consequences. *Stackpole* v. *Boston Elevated Railway*, 193 Mass. 562. *Mathes* v. *Lowell, Lawrence, & Haverhill Street Railway*, 177 Mass. 416. It is unnecessary to consider whether there was evidence of negligence on the part of the motorman.

Exceptions overruled.

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WALLACE GOODRICH *vs.* JOHN B. DORE, trustee.

Suffolk. January 21, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Mortgage. Pledge. Bankruptcy.

An unrecorded bill of sale of personal property intended as security for a loan cannot be effective against third persons either as a mortgage or a pledge unless the property is delivered to and retained by the mortgagee or pledgee.

Under R. L. c. 198, § 1, and the bankruptcy act of 1898 the holder of an unrecorded bill of sale of personal property, which was given as security for a loan by one who after its delivery became a bankrupt while still retaining possession of the property, has no title as against the trustee in bankruptcy.

TORT for the alleged conversion of certain scientific instruments by the trustee in bankruptcy of the Ziegler Apparatus Company, a corporation, which were claimed by the plaintiff under a bill of sale as security for the sum of $225 lent by him to the corporation. Writ in the Municipal Court of the City of Boston dated March 26, 1906.

On appeal to the Superior Court the case was tried before *Hardy*, J. The loan from the plaintiff to the Ziegler Apparatus Company was made on September 30, 1905, when a note of that company of that date for $225 and the bill of sale were delivered to the plaintiff.

The instruments described in the bill of sale were for a long time before its delivery and at that time in show cases in the company's store at 200 Summer Street in Boston. One Ziegler, who was the treasurer and the general manager of the corporation, on September 30 went back to the store and placed the letter "G" on the tag on each of the instruments, with the intention of representing thereby the plaintiff's name. He agreed to do this when the note was given. Three or four days afterwards the agent of the plaintiff came to the store and Ziegler showed him where he had marked the letter "G" on the tags, and the plaintiff's agent then said that he took possession of the instruments for the plaintiff. The agent reported this to the plaintiff. The bill of sale never was recorded in any public record. It was understood between the parties that if the note

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was paid when due the instruments were not to be taken away, and the plaintiff would have no further claim upon them.

The plaintiff's agent testified that some time after September 30, 1905, he and the plaintiff went to the company's store and informed Ziegler that they had come to remove the security. Ziegler replied: "All right. Everything is here all ready for you to remove but I wish you would leave them here as they are as safe here as they would be if you removed them. I promise you I will take good care of them and deliver them to you at any time you may demand them. The reason I want them left in my possession is that they are fine instruments and I have not got duplicates. If I have them here it will help me in making sales. Mr. Goodrich will have no trouble in the matter." Thereupon the plaintiff left the instruments there.

Ziegler testified that he kept these instruments in two show cases in the company's store for a long time before and after September 30, 1905, until the defendant took possession of them as trustee in bankruptcy. He used one of the instruments for some electrical measurements, and used another several times for weighing platinum. In his opinion this use of the instruments would not affect their value in any way. The tags were removed from the instruments when he used them, as they were in the way; but he put the tags on again as soon as he finished using them and replaced the instruments in the same places as before in the show case. The tags were thereafter kept on the instruments and were on them when the bankruptcy proceedings began.

It was agreed that the Ziegler Apparatus Company made a common law assignment on October 17, 1905, and was adjudicated bankrupt on November 5, 1905; that the defendant was appointed trustee in bankruptcy on November 23, 1905, and received the instruments in question at that time; and that upon demand he refused to surrender them to the plaintiff.

The plaintiff asked the judge to make the following rulings:

1. If the jury find that the articles sued for were marked by Ziegler as the property of the plaintiff and were left with Ziegler to keep for the plaintiff until the note was paid, then the plaintiff is entitled to recover.

2. If it was the intention of the plaintiff and Ziegler that

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Ziegler should retain the articles sued for, as the property of the plaintiff, and keep them for the plaintiff, then the plaintiff is entitled to recover, provided Ziegler did keep the articles until they were taken by the defendant as trustee in bankruptcy.

3. A slight use of some of the articles by Ziegler, which did not affect the value of them, would not deprive the plaintiff of his rights under his agreement with the Ziegler Company.

4. Upon all the evidence as a matter of law the agreement between the plaintiff and the Ziegler Company was not a mortgage.

5. The delivery of the bill of sale if so intended was a sufficient delivery of possession to the plaintiff.

The judge declined to make any of these rulings, and framed the following questions for the jury:

1. Was the conveyance of the property in this case a mortgage?

2. Was the property conveyed by the bill of sale delivered to and retained by the grantee, Goodrich?

3. What was the fair market value of the property described in the bill of sale at the time of the demand for the same by the plaintiff, Goodrich, upon the defendant?

At the close of the evidence the judge instructed the jury to answer "Yes" to question 1 and "No" to question 2, and submitted question 3 to them upon appropriate instructions as to the value of the goods. The judge ordered a verdict for the defendant upon the whole case; and the plaintiff alleged exceptions to the rulings of the judge and to his refusal of the rulings requested.

W. R. Bigelow, for the plaintiff.

W. J. Drew, (*J. B. Dore* with him,) for the defendant.

SHELDON, J. This case is governed by the decisions in *Moors* v. *Reading*, 167 Mass. 322, and *Hawes* v. *Weeden*, 180 Mass. 106. There was as much evidence of a delivery and as much retention of possession in those cases as in the case at bar. It is immaterial whether the plaintiff has the rights of a mortgagee or of a pledgee. If the former, the mortgage was invalid because it was not recorded and the property was not retained by him in conformity with the requirements of R. L. c. 198, § 1; if the latter, his failure to retain possession of the property was equally fatal

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to him. He cannot claim the property against his debtor's trustee in bankruptcy. *Drury* v. *Moors*, 171 Mass. 252. *Haskell* v. *Merrill*, 179 Mass. 120.

Exceptions overruled.

RODEN S. HARRISON *vs.* EBEN D. JORDAN.

Suffolk. January 21, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Landlord and Tenant. Damages.

Inserted among the covenants of a lease, and before the clause giving the lessor the right of re-entry for breach of covenant, was the following: "If the lessor or his assigns shall decide at any time to remove the buildings on the leased premises, he or they may terminate this lease by paying to the lessee the sum of $2,500." During the term of the lease, and when there had been no breach of covenant, the assignee of the lessor gave the assignee of the lessee a notice to quit and about a month later began to tear down the buildings. The assignee of the lessee sued for $2,500 under the clause of the lease above quoted. *Held*, that the clause sued upon was not a covenant to pay $2,500 as liquidated damages in case the lessor terminated the lease, but merely gave to the lessor the right, which he had not exercised, to terminate the lease by paying the lessee $2,500; so that the plaintiff's remedy, if any, was an action for such damages as he could prove that he had suffered from being evicted.

LORING, J. In this case a lease was made on November 15, 1899, to run for five years. After a statement of a right in the lessor to enter on the premises "to view," to show them to others and to make repairs and alterations, and of a right to terminate the lease if the premises should be taken by right of eminent domain or destroyed by fire or unavoidable casualty, and before the clause for a re-entry by him in case the covenants of the lease were broken, the following clause is inserted in the lease: "If the lessor or his assigns shall decide at any time to remove the buildings on the leased premises, he or they may terminate this lease by paying to the lessee the sum of twenty-five hundred dollars."

By sundry mesne conveyances the estate of the lessor became vested in the defendant on February 1, 1901, and that of the

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lessee became vested in the plaintiff in July, 1900. On March 30, 1901, the defendant being in fact ignorant of the existence of the lease in question and supposing the plaintiff to be a tenant at will, undertook to terminate the tenancy by a notice to quit, and in "the latter part of April" began to tear down the buildings on the leased premises. Thereupon the plaintiff brought this action to recover the $2,500 named in the clause of the lease stated above. The Superior Court found for the defendant, and the case is here on a report.*

The clause sued on is not a covenant to pay $2,500 as liquidated damages in case the lessor evicts the lessee or terminates the lease, but is a clause conferring on the lessor the privilege of terminating the lease by paying the lessee $2,500. To act under it the lessor had to pay $2,500.

This is made plain by considering what the rights of the parties would have been if the plaintiff had found it to be for his interest to claim damages for being evicted. To such a claim the defendant could not successfully have set up in defence that he had terminated the lease under the clause here in question by what he did in the case at bar.

If the plaintiff had a grievance in the premises, it was for having been wrongfully evicted.

Judgment on the finding.

W. H. Preble & J. W. Keith, for the plaintiff, submitted a brief.

T. Hunt, for the defendant.

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* The case was reported subject to the following agreement of the parties: "If the plaintiff upon the facts is entitled to recover under the first count of his declaration, judgment is to be entered in his favor for $2,500, and interest from the date of the filing of the declaration. If he is not entitled so to recover, then judgment is to be entered for the defendant."

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JOHN OWENS *vs.* HARVARD BREWING COMPANY.

Suffolk. January 22, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence.

In an action against a brewing company for personal injuries from falling into an opening in the sidewalk of a city street from which the servants of the defendant had removed a bulkhead in order to deliver beer in the cellar of a hotel, if there is conflicting evidence as to whether the defendant's servants placed barrels on each side of the opening to prevent travellers on the street from falling into it or whether they left the opening unguarded, the question of the defendant's negligence is for the jury.

In an action by a letter carrier against a brewing company for personal injuries from falling into an opening in the sidewalk of a city street from which the servants of the defendant had removed a bulkhead in order to deliver beer in the cellar of a hotel, if there is evidence that the plaintiff had delivered letters on this route for a number of years and had seen the bulkhead open about once a month during that time, that just previous to the accident he had delivered letters in the building next door to the hotel and had come out with a bundle of letters in his left hand at which he was looking when he walked into the opening, which extended about half way across the sidewalk, the question of the plaintiff's due care is for the jury.

TORT for personal injuries from falling into an opening in the sidewalk on Bowdoin Square in Boston from which the servants of the defendant had removed the bulkhead for the purpose of delivering beer in the cellar of the Bowdoin Square Hotel numbered 1–6 in that square, owing to the alleged negligence of the defendant's servants in leaving the opening unguarded. Writ dated April 18, 1903.

In the Superior Court the case was tried before *Bond*, J. The accident happened about a quarter before five o'clock in the afternoon of December 27, 1902. The plaintiff was sixty-three years of age and had been employed as a letter carrier in the city of Boston for more than thirty years. A part of his route included the northerly side of Court Street going from Sudbury Street toward Chardon Street and the northerly side of Bowdoin Square going in the same direction. The length of the opening from which the bulkhead had been removed was four feet eleven

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inches and its width two feet eight inches, leaving a clear space on the sidewalk of five feet six inches.

The plaintiff testified that he had been on this route for many years; that previous to the accident he had been upon this route continuously for six months; that just previous to the accident he left mail at the office of the Bowdoin Square Theatre, came out from the vestibule of the theatre ahead of the crowd and went in the direction of Chardon Street, as was his usual custom; that he barely had left the theatre entrance as he went on his way with a bundle of letters in his left hand when the first he knew he fell into the hole; that from the nearest point of the open hatchway to the entrance to the Bowdoin Square Theatre was a very small distance; that the open hatchway did not occupy quite half of the sidewalk; and that before falling into the opening he did not come in contact with any obstacle. He could not recollect whether the lights in the hotel window were lighted.

On cross-examination he said that he had seen the bulkhead open about once a month during the time that he had worked there lately, and possibly once a month during the six years that he had worked there, and that when he came out of the Bowdoin Square Theatre he was looking at the letters in his left hand.

There was conflicting evidence, which is referred to in the opinion, as to whether the defendant's servants had placed barrels on each side of the opening to prevent travellers on the street from falling into it.

At the close of the evidence the defendant asked the judge to order a verdict for the defendant. This the judge refused to do, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $1,375. The defendant alleged exceptions.

J. Lowell, (*J. A. Lowell* with him,) for the defendant.

G. C. Dickson, for the plaintiff.

MORTON, J. The evidence was conflicting whether barrels were placed on each side of the opening left by the removal of the bulkhead to prevent any one from falling into it, and the question was plainly one for the jury. So also we think was the question of the plaintiff's due care. He had some right at least

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to assume that bulkheads would not be left open in the sidewalk without being suitably guarded, and knowledge of the existence of the bulkhead did not necessarily convict him of heedlessness. It was for the jury, taking into account all of the circumstances, the time of day, his knowledge of the locality, the nature of his occupation and such other matters, if any, as were entitled to consideration, to say whether he acted as a man of reasonable prudence would have done under like circumstances. *Woods* v. *Boston*, 121 Mass. 337. *Fuller* v. *Hyde Park*, 162 Mass. 51. *Lamb* v. *Worcester*, 177 Mass. 82. We see no error in refusing the ruling that was requested.

Exceptions overruled.

PATRICK SULLIVAN *vs.* RANSOM ROWE & another.

Suffolk. January 22, 1907. — February 28, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence, In maintaining trench machine, *Res ipsa loquitur*. *Practice, Civil*, Exceptions, Judge's charge. *Evidence*.

The falling on the head of a man, who is working in a sewer in process of construction, of an iron buffer suspended on the rod of a Carson trench machine and used to control the passing of the excavating buckets can be in itself evidence of negligence.

In an action by a workman against his employer for personal injuries from an iron buffer of a Carson trench machine, which was suspended over a sewer in process of construction, falling on his head while he was working in the trench, if the circumstances are such that the falling of the buffer is in itself evidence of negligence, the fact that the plaintiff has introduced evidence in attempting to show why it fell does not preclude him from relying on the doctrine of *res ipsa loquitur*, which entitles him to go to the jury on showing that the accident happened.

On an exception to a particular portion of the charge of a presiding judge, this court will consider all of the charge which appears by the record, to determine whether the instructions to the jury taken as a whole were correct on the point to which the exception relates.

In an action by a workman against his employer for personal injuries from an iron buffer of a Carson trench machine, which was suspended over a sewer in process of construction, falling on his head while he was working in the trench, the plaintiff may show the condition immediately after the accident of the bolt from which the buffer was suspended.

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TORT for personal injuries incurred on June 15, 1904, while in the employ of the defendants, who were contractors engaged in digging a trench for a drain, from being struck on the head by an iron buffer which dropped from a Carson trench machine while the plaintiff was at work beneath it assisting in shoring up a trench eighteen feet in depth. Writ dated July 16, 1904.

In the Superior Court the case was tried before *White*, J. A Carson trench machine ordinarily is used in excavating ditches for sewers. The machine in use at the time and place of the accident had been in operation about two months on this particular job. In this machine at the time and place of the accident six buckets were suspended from and ran along an iron rail laid on a girder supported by wooden legs about fifteen feet in height. The buckets could be raised and lowered into the ditch by means of a tail rope, which ran through pulleys to the drum of the engine. In order to prevent the buckets from running along the rail beyond the desired point a device known as a buffer iron was used. A buffer consists of two tongues of iron each about twenty-one inches long, three inches wide and three-quarters of an inch thick, and swings on a three-eighths or one-half inch pin or bolt driven through the girder, being so arranged that when it is swung upward on the pin by means of a rope, the buckets can pass along the rail, but when it is dropped the tongues prevent the buckets from passing and hold them stationary at the desired point. This pivot or bolt upon which the tongues of the buffer iron are suspended extends beyond the girder on either side, and is kept in place by small two-pronged steel pins, called split keys or cotter-pins, which pass through holes in the pivot bolt on each side of the girder. A buffer weighs about seven pounds. These tongues besides being secured on the bolt by the split key also are secured to each other and to the overhead rail by a rope which passes through each of the tongues and over the overhead rail. There was evidence that on the day that the plaintiff was injured there was no rope connecting and securing the tongues of the buffer, and that the purpose, or one of the purposes, of this connecting rope was to prevent the tongues from falling into the trench in case the key came out.

One Carroll, who was the defendants' foreman in charge of

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the work in which the plaintiff was employed at the time of the accident, was called as a witness by the plaintiff, and testified that there was no rope on the machine on the day the plaintiff was hurt, that he examined the machine immediately after the accident and there was no rope connected with the buffer at that time. He then was asked the question: "What was the condition of the bolt from which this buffer iron was suspended, at the time you examined — of the bolt passed through the girder, from which the buffer iron was suspended?" This question was objected to by the defendants and was admitted by the judge subject to the defendants' exception. The question was repeated in the following form: "Now, Mr. Witness, I wish you would describe the condition in which the bolt was immediately following the accident and before the machine was again put in operation at the end of these five minutes you speak of." The witness answered: "Of course I don't know in what condition the bolt was before the accident happened, for I hadn't examined the machine; but after the accident had happened, and we went to put the buffer up again, I found that the main pin that come through the wooden girder had gone to my left, as I am turning this way, and we had to get a striking hammer to turn it back."

At the close of the plaintiff's evidence and again at the close of all the evidence the defendants asked the judge to rule that the plaintiff was not entitled to recover and to order a verdict for the defendants. This the judge refused to do.

The defendants also asked for other rulings of which the fifth was as follows: "The mere happening of the accident is no evidence of negligence on the part of any one. The facts shown do not constitute a case where the doctrine of *res ipsa loquitur* applies." The judge refused to make this ruling.

A portion of the judge's charge was as follows: "Was there anything that the defendants could have done that they did not do, by the way of inspection or by way of guarding against that accident, which could have prevented it?

"Now, the law says that the jury shall not found a verdict for a plaintiff upon a mere guess; when the plaintiff has only introduced evidence which leaves the jury to conjecture — a guess — as to the way it happened, then the plaintiff has not

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sustained the burden of proving the facts necessary to enable him to recover. That is, there must be such a high degree of probability that men would act upon it, that this happened from the negligence of the defendant rather than from any other causes that are consistent with his due care. And if you are left entirely in doubt as to the matter, why, then the plaintiff has not sustained the burden of proof, and the verdict should be for the defendant. If he has sustained the burden of proving to you by way of exclusion that according to the high probabilities of the case this accident happened by the negligence of the defendant, why, then he may be said to have sustained the burden of proof."

At the end of the charge the judge said: "You will take this matter and give it your careful consideration. If you find the plaintiff has sustained the burden under the circumstances I have suggested to you, you will assess his damages and give him fair compensation for such injury as he has received; and if you find that he has failed to sustain the burden and has so placed it before you that you are left to a mere guess — if he hasn't gone farther than that, then the defendant is entitled to your verdict."

The jury returned a verdict for the plaintiff in the sum of $12,500, of which the plaintiff afterwards remitted all in excess of $6,250. The defendants alleged exceptions to the admission of the evidence above described, to the refusal of the judge to make the rulings requested by it, and to the first paragraph and a part of the second paragraph of the portion of the charge above quoted as stating the rule in regard to the burden of proof incorrectly.

E. K. Arnold, for the defendants.

J. J. Irwin, for the plaintiff, was not called upon.

LORING, J. In our opinion the falling of the buffer was under the circumstances in itself evidence of negligence. This disposes of the fifth request and also of the request that the jury be directed to find for the defendant. Although the plaintiff in his evidence went beyond showing that the buffer fell, he did not go far enough to deprive him of the case made by the falling of the buffer. The case in this respect comes within *Cassady* v. *Old Colony Street Railway*, 184 Mass. 156.

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Taking the instruction as a whole, it is not subject to the complaint now made, that the jury were not properly instructed as to the burden of proving negligence.

Evidence of the condition of the bolt immediately after the accident was admissible.

Exceptions overruled.

KAREKIN M. GIRAGOSIAN *vs.* DIKRAN P. CHUTJIAN.

Suffolk. December 5, 1906. — March 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, BRALEY, LORING, & RUGG, JJ.

Trade Name. Equity Jurisdiction, To enjoin unlawful use of trade name, To assess damages.

In a suit in equity by one doing business under the name "Oriental Process Rug Renovating Company," to enjoin an alleged interference with his rights in the use of this designation as a trade name, it appeared that about the time the plaintiff began to use this name the defendant began to carry on a business similar to that of the plaintiff under the name "Oriental Rug and Carpet Renovating Works," that when the defendant adopted this name the plaintiff had acquired no rights in his own trade name, and the defendant adopted the name in good faith without any intention of acquiring the plaintiff's business or of palming off his own business as that of the plaintiff, that neither the plaintiff nor the defendant used any process for cleaning or repairing rugs which was peculiar to himself, that each was familiar with and used the processes common in Oriental countries, so far as there were any such peculiar processes, and that each did as good work as the other. *Held*, that there was no ground for granting an injunction.

Where an injunction was granted to one carrying on business under the name "Oriental Process Rug Renovating Company," to restrain the defendant, who carried on business under the name "Oriental Rug and Carpet Renovating Works," from changing the order of the words of this name to "Oriental Carpet and Rug Renovating Works," so that it would appear alphabetically in the telephone directory before the trade name of the plaintiff, the justice who granted the injunction found that the damage to the plaintiff from the defendant's wrongful conduct had not been more than a very few dollars, and that the plaintiff had not sustained damage enough to warrant the reference of the case to a master, and in the decree granting the injunction ordered costs for the plaintiff but no damages. *Held*, that the decree was a proper one, a court of equity not being bound to send a case to a master where it is manifest that the damages are so small that they would be exceeded by the cost of the hearing.

The smallness of a claim is a proper ground for refusing to enforce it in equity.

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BILL IN EQUITY, filed in the Supreme Judicial Court on January 21, 1905, to restrain the defendant from using the names "Oriental Rug and Carpet Renovating Company" and "Oriental Carpet and Rug Renovating Company" to designate or in connection with the defendant's business, praying for an injunction and for damages.

The case was heard by *Sheldon*, J., who found the facts which are stated in substance in the opinion. He made a decree enjoining the defendant from using, in connection with his business, the name "Oriental Carpet and Rug Renovating Works," or any other colorable imitation of the plaintiff's business name, "Oriental Process Rug Renovating Company," unless there were prefixed the name of the defendant or other words or terms sufficient clearly to distinguish it from the plaintiff's business name, but not enjoining the use of the name "Oriental Rug and Carpet Renovating Works" in connection with the defendant's business, and ordering that the defendant pay to the plaintiff his costs of suit taxed at $33.40.

The plaintiff appealed, and the justice at the request of the plaintiff reported the material facts found by him.

E. D. Chadwick, for the plaintiff.

A. S. Apsey, for the defendant, was not called upon.

KNOWLTON, C. J. The plaintiff contends that the defendant has interfered with his rights to the use of his trade name, "Oriental Process Rug Renovating Company," as a designation of the business carried on by him. The single justice who heard the case found that the plaintiff has used this name since September, 1900, and that the defendant began to carry on a business similar to that of the plaintiff at about the same time, under the name, "Oriental Rug and Carpet Renovating Works." "When the defendant adopted this name the plaintiff had not acquired any rights in his own trade name; it had not become identified with the plaintiff, either among dealers or with the general public, and the defendant adopted his name in good faith, without any intention of wronging the plaintiff or of acquiring the plaintiff's business or of palming off his own business as that of the plaintiff. The defendant also advertised his business considerably, — generally under the name 'Chutjian Brothers, Oriental Rug and Carpet Renovating Works.' . . .

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Neither one of the parties uses any process of cleaning or repairing rugs which is peculiar to himself; each is familiar with and uses the processes common in Oriental countries, so far as there are any such peculiar processes. Each does as good work as the other."

Upon these findings, neither has acquired any better right to the use of his trade name than has the other to the use of his trade name. The name used by the defendant is nothing more than a simple description of his establishment, in reference to the kind of business carried on there. It is a name which any one engaged in that business properly may use, if he does nothing which tends to deprive another of the benefit of his good reputation among his customers. If a use of it would indicate to the public that his establishment was that of another person who had become favorably known in the trade, and would thus take away from that person business which otherwise would go to him because of his good reputation, he might be required to accompany the name with something to show that his was a separate business. *Fox Co.* v. *Glynn*, 191 Mass. 344. *Cohen* v. *Nagle*, 190 Mass. 4. *American Waltham Watch Co.* v. *United States Watch Co.* 173 Mass. 85. But the facts in the present case show no reason for enjoining the defendant. *Fox Co.* v. *Glynn*, *ubi supra*.

The fact that the defendant, in 1904, used the name "Oriental Carpet and Rug Renovating Works" so that it would appear alphabetically in the telephone directory before that of the plaintiff, and perhaps strike the eye first if one was looking for the name of a renovator of rugs, and give him some of the plaintiff's customers, was made the ground of an injunction against the use of that name by the defendant. So far as appears, this part of the decree is satisfactory to both parties.

Upon the hearing of the whole case, the justice found that the plaintiff had not sustained enough damages from the defendant's wrongful conduct to warrant a reference of the case to a master. His finding is that the damage was not more than a very few dollars. He therefore decreed an injunction against the use of the name, "Oriental Carpet and Rug Renovating Works," or any other colorable imitation of the plaintiff's name, but did not enjoin the use of the original name, "Oriental Rug and

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Carpet Renovating Works," and decreed costs in favor of the plaintiff.

The plaintiff contends that the case should have been referred to a master to assess damages. If the damages were substantial this order would be made, unless some other mode of determining their amount was agreed upon. But a court of equity is not bound by any rule to send the parties to a master in such cases, when it is manifest that the cost to the plaintiff of a hearing would be much more than the damages which he seeks to recover. An order of reference, under such conditions, would be inequitable. The smallness of a claim has repeatedly been stated as a ground for refusing to take jurisdiction in equity. *Cummings* v. *Barrett*, 10 Cush. 186, 190. *Smith* v. *Williams*, 116 Mass. 510, 513. *Chapman* v. *Banker & Tradesman Publishing Co.* 128 Mass. 478.

Decree affirmed.

JOHN F. LIBBY *vs.* CHARLES L. TODD & another, administrators with the will annexed.

Middlesex. December 6, 1906. — March 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Guardian ad Litem. Probate Court. Executor and Administrator.

It is possible that there may be a case in which it is the duty of a guardian *ad litem* to raise a question as to the right of his wards to receive certain property, although it is conceded by all the other parties in interest, on the ground that it is for the interest of his wards to have their rights settled rather than to have the property with a liability to refund it; but where the interest of the wards is a future one which may not vest for upwards of fifty years the remote possibility that his wards now unborn and unascertained may have to refund the property after having received it does not justify a guardian *ad litem* in raising and pressing a doubt as to the validity of a payment made by the administrator of an estate ultimately for the benefit of his wards by opposing the allowance of such payment in the administrator's account until the matter can be passed upon by the court.

Since the enactment of R. L. c. 150, § 19, which was passed for the purpose of giving the Probate Court power to protect an executor or administrator in paying

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legacies or distributive shares by a decree of distribution, the allowance of the accounts of an executor or administrator stating such payment in the settlement of an estate has the effect of a decree of distribution under the statute.

LORING, J. This is an appeal taken by a guardian *ad litem* from a decree of the Probate Court fixing his compensation at $60. It came before the single justice on an agreed statement of facts and without decision was reserved by him for our consideration.

The appellant was appointed guardian *ad litem* to represent the interest of persons unborn or unascertained in the final account of the administrators with the will annexed of Charles L. Tarbell. These administrators assumed that under the will of their testator, in the event which happened, the testator's wife had a power of appointment of the residue of the testator's estate. The wife, in the exercise of this power, had appointed the estate to trustees "for the benefit of certain tenants for life, followed by certain contingent limitations to persons unborn and unascertained," in the words of the agreed facts. Nothing appears in the agreed facts beyond this bare statement. As we understand it, the interests which the appellant was appointed to represent were the interests of those then unborn and unascertained, to whom the residue had been given by appointment in remainder subject to the life estates mentioned above.

The occasion of the appointment of the appellant arose from the fact that the two accountants (that is, the administrators with the will annexed of the testator Charles L. Tarbell) were the two trustees to whom the estate was appointed by the wife, and the executor of the wife's estate (to whom under the rule of *Olney* v. *Balch*, 154 Mass. 318, the estate was to be paid) was one of these two.

In the account in question the accountants charged themselves with $144,451.29, and asked to be allowed for "several items of cash paid out" and their compensation, amounting in all to $2,735.35. The account showed that the balance of $141,715.94 had been paid, on July 8, 1903, to the executor of the wife, Martha E. Tarbell.

The appellant in his report as guardian *ad litem* states that he has examined the account with the vouchers and securities, and that he dissents from the allowance of the account on the

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ground that it was a matter of doubt whether on the true construction of the will his wards were entitled to the payment which had been made for their benefit; that a bill for instructions should be brought; "and that there should not be an attempt to settle the rights of all the parties interested by means of an account in the Probate Court. See *Lincoln* v. *Aldrich*, 141 Mass. 342." "Thereafter," in the words of the agreed facts, "the question of the allowance of the account as affected by the question whether the will of said Charles L. Tarbell was so ambiguous as to require the question of its construction to be presented in the form of a bill for instructions was argued orally and on briefs by said John F. Libby [the appellant] *pro se*, and by counsel for said administrators. All persons were duly notified, but no other person or party appeared at said hearing or at any other time to object to said account."

The judge of probate decided on this argument that the construction put upon the will by the accountants was probably the true one, but that he was "very far from being convinced" that it was so. He then stated that "the hearing before the court was mainly directed to the question — as to whether or not the account should be passed upon without a preliminary construction of the will," and he concluded that he would not "be willing to allow the account in any event without further hearing, and that it would be the best course to raise the question of construction in an independent proceeding."

Thereupon the bill for instructions was brought which is reported in *Todd* v. *Tarbell*, 187 Mass. 480, sustaining the construction adopted by the accountants.

In March, 1905, the appellant asked to be paid $300 for services and compensation as guardian *ad litem*. This the administrators refused to pay "on the ground that said Libby was not entitled to compensation for raising and pressing the question as to the construction of said will, but offered to pay for such services as they deemed had been properly performed by him from ten to twenty-five dollars."

The guardian thereupon brought the petition which is now before us, asking the Probate Court to fix his compensation. A decree was entered by that court fixing his compensation at $60. From this decree the appeal here in question was taken by the

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guardian *ad litem*. The appeal was submitted to the single justice on an agreed statement of facts the substance of which has just been stated, and was reserved on those facts for the full court. The agreed facts end with this stipulation: "It is agreed that $300 is reasonable compensation for all services performed by said John F. Libby as such guardian *ad litem* and that said amount may be allowed, provided he is entitled to compensation for raising and pressing the question as to the construction of the said will of Charles L. Tarbell; and that he, said Libby, may be allowed only $60 for his entire services if he was not entitled to raise and press said question."

The duty cast upon and assumed by the appellant as guardian *ad litem* was to secure and preserve the interests of his wards, *Bicknell* v. *Bicknell*, 111 Mass. 265, *Guild* v. *Cranston*, 8 Cush. 506, 509, *Tripp* v. *Gifford*, 155 Mass. 108, 110, and for his services in so doing he was entitled to reasonable compensation.

What the appellant did was in the first place to raise a doubt as to the payment (which had been made and which was ultimately for the benefit of his wards) being made to those entitled under the will of the testator; and in the second place to object to the allowance of the administrators' account on that ground.

What he now asks is that he should be paid out of the estate not merely for raising the doubt but also for arguing that the doubt was well founded and that for that reason the account of the administrators with the will annexed should be disallowed.

The first position of the appellant's counsel is that it was not the duty of the guardian *ad litem* to suppress facts to secure an unjust advantage for his wards. It is manifest that that argument falls short of making out the guardian *ad litem's* demand to be paid for arguing that there was a doubt as to his wards being entitled to the fund which every one conceded to be theirs, and insisting that the account should be disallowed for that reason.

His next position is that it was for the interest of his wards that the doubt which he alone had raised should be settled then.

We are not prepared to say that there might not be a case in which it is the duty of a guardian *ad litem* to raise a doubt as to his wards' right to property which is conceded by everybody else, because it is for his wards' interests to have their rights

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settled rather than to have the property with a liability to refund. But if such a case can arise, this is not that case.

In the case at bar there could be no liability on the part of the appellant's wards or on the part of anybody else to refund if the account in question had been allowed. Had the account been allowed there could have been no liability to refund because the allowance of the account would have established as against all interested in the fund the validity of the payment as therein set forth.

The appellant contends that it would not have been decisive on the authority of Smith's Probate Law, (5th ed.) 186, and *Granger* v. *Bassett*, 98 Mass. 462. But when the case of *Granger* v. *Bassett* was decided in 1868, the Probate Court had no jurisdiction over the question whether a person was or was not entitled to a legacy under a will. At that time the right to be paid a legacy had to be determined in an action at law under what is now R. L. c. 141, § 19, or in a bill for instructions. But that was changed by R. L. c. 150, § 19, which was enacted for the very purpose of giving the Probate Court power to protect an executor in making payment of a legacy. See Report of Commissioners on R. L. note to c. 150, § 19.

There is another question involved in the conclusion that this account would have been decisive, and that is this: Would the allowance of this account (in which the payment to the person entitled under the will is stated) without a decree having been made under R. L. c. 150, § 19, have operated as an implied decree for payment under that section as well as an allowance of the payment itself?

Before the case of *Palmer* v. *Whitney*, 166 Mass. 306, was decided, there seems to have been some doubt as to the conclusiveness of a decree allowing the final account of an administrator in which the accountant asked to be allowed for payments of distributive shares to the next of kin where there had been no order of distribution. Such practice seems on the one hand to have been recognized as permissible in *Emery* v. *Batchelder*, 132 Mass. 452; *Newell* v. *Peaslee*, 151 Mass. 601, 604, 605. On the other hand it would seem from what was said in *Browne* v. *Doolittle*, 151 Mass. 595, 596, and in *New England Trust Co.* v. *Eaton*, 140 Mass. 532, 533, that the practice did not meet with

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the approval of this court. The decision in *Browne* v. *Doolittle* is not to the contrary. What was decided in that case was that a Probate Court has no jurisdiction to decree a distribution within the two years during which a creditor can bring suit against an administrator. That is a case therefore like *Granger* v. *Bassett*, and so is the case of *Lincoln* v. *Aldrich*, 141 Mass. 342, on which the guardian *ad litem* relied in the Probate Court. The underlying difficulty with that case was that there is no jurisdiction in a Probate Court sitting as such to determine who are the persons entitled to receive a trust fund on its termination.

These doubts however were put at rest by *Palmer* v. *Whitney*, 166 Mass. 306, and the doctrine of that case seems to have been recognized by this statement in *Lamson* v. *Knowles*, 170 Mass. 295, 297: "The settlement of the accounts of an administrator by implication includes the passing of an order for the distribution of the funds in his hands." What was said in *Goff* v. *Britton*, 182 Mass. 293, 295, should not be taken to unsettle the practice established by *Palmer* v. *Whitney*.

But, if it is going too far to say that the guardian *ad litem* ought to have known that the allowance of the account would have eliminated any possibility of his wards having to refund if the property came to them, he stands no better. He still has not shown that he is entitled to be paid for what he did.

It is not stated in the agreed facts who were the persons subject to whose life estates the appellant's wards took the residuary estate, and the facts before the court in *Todd* v. *Tarbell*, 187 Mass. 480, are not made part of the present case. The burden is on the appellant to make out his case. It may be that the appellant's wards took subject to life estates in the minor children of Charles F. Tarbell, a deceased son of the testator. If they did it may be assumed that the estate would not be likely to vest in the wards of the appellant for upwards of some fifty years. While it has been decided that so long as an executor has assets in his hands the statute of limitations does not run in his favor, *Brooks* v. *Lynde*, 7 Allen, 64, *Kent* v. *Dunham*, 106 Mass. 586, *Smith* v. *Wells*, 134 Mass. 11, it never has been held in this Commonwealth, so far as we know, that where the whole estate is paid over by an executor to A. when it ought to have been paid to B., the statute does not run in favor of the executor

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as against B. In case of a trust under similar circumstances the statute of limitations does run. *Treadwell* v. *Treadwell*, 176 Mass. 554.

However that may be, the question which the appellant had to consider was not whether recovery could be had from the executor of the testator, nor whether a recovery could be had from the executor of the donee of the power (the testator's wife), but whether a recovery could be had from the appellant's wards after the fund had been paid over to them on the termination of the life estates some fifty years hence, if it was so paid over. The remote possibility of his wards being liable to pay back to others this property if it ever came to them was too remote in law and in fact to justify the appellant in raising and pressing the doubt as to the correctness of the payment which had been in fact made and which was ultimately for the benefit of his wards.

By the terms of the agreed facts and of the reservation, under these circumstances the entry must be

Decree of Probate Court affirmed.

H. Winn, for the appellant.

R. L. Robbins, for the administrators.

CHARLES R. EVANS *vs.* EUGENE N. FOSS.

Suffolk. December 6, 1906. — March 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Equitable Restrictions. Equitable Jurisdiction, To enforce restriction on land. *Garage.*

Where the owner of a tract of land makes deeds of different portions of it each containing the same restriction upon the lot conveyed, which is imposed as part of a general plan for the benefit of the several lots, the grantees are given an equitable right to enforce against each other the restriction made for their common benefit.

Where a restriction for the common benefit is imposed upon the grantees of all the lots in a large tract of land, the fact that in some parts of the tract other restric-

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tions also are imposed does not show that the restriction common to all the deeds was not intended to apply alike to all.

The erection of a garage designed to accommodate about one hundred and twenty automobiles of the larger type, having under it a steel tank arranged to hold ten barrels of gasoline, and containing a repair shop one hundred feet by thirty feet, with a small portable forge in one corner, where from six to eight cars of the largest type can be repaired simultaneously, the building being intended to be used as a salesroom, repair shop and repository for a company manufacturing automobiles, with demonstrators to run cars for possible purchasers, and also being intended to be used to store and care for automobiles belonging to about seventy-five or one hundred customers whose automobiles would go in and out on an average once each day, can be found to be a violation of a restriction, imposed on the land on which it is being constructed, that no building erected thereon shall "be used or occupied for a stable, either livery or public or private, for carpenter's shops, white or blacksmith shops, or for any foundry, mechanical or manufacturing purposes or for any other business which shall be offensive to the neighborhood for dwelling houses," especially where there is much evidence tending to show that the business proposed to be carried on would be "offensive to the neighborhood for dwelling houses."

In a suit in equity to enforce a restriction on land imposed for the protection of the surrounding lots for residential purposes it is no reason for refusing to enforce the restriction that in the opinion of the judge who hears the case the land in ten years "will be wanted for business purposes, and is worth more for such purposes than for residential purposes," if since the restriction was imposed there has been no material change in the conditions directly affecting the character and use of the property in question.

KNOWLTON, C. J. The plaintiff seeks by this bill to obtain an injunction to prevent the erection of a garage by the defendant on Newbury Street in Boston. The case was reserved by a judge of the Superior Court upon the pleadings, his findings of fact, and the evidence taken before a commissioner. The plaintiff is the owner of a house and lot on Newbury Street, very near the defendant's lot on which he began to build a garage. In the deeds under which the respective parties claim title there is a restriction, as follows: "No building shall be erected on said described premises except outhouses to dwellings, the exterior walls of which shall be of any other material than brick, stone or iron, nor shall any building erected thereon be used or occupied for a stable, either livery or public or private, for carpenter's shops, white or blacksmith shops, or for any foundry, mechanical or manufacturing purposes or for any other business which shall be offensive to the neighborhood for dwelling houses." The judge found that the purpose of this restriction in the deed of Whitney and others, trustees, to Fairchild, under which both parties claimed, was a "furtherance of a general scheme for the

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improvement of the granted property and that the same were imposed to benefit the parcels conveyed." It is a familiar principle of law, which has been applied in many cases, that when one makes deeds of different portions of a tract of land, each containing the same restriction upon the lot conveyed, which is imposed as a part of a general plan for the benefit of the several lots, such a restriction not only imposes a liability upon the grantee of each lot as between him and the grantor, but it gives him a right in the nature of an easement, which will be enforced in equity against the grantee of one of the other lots, although there is no direct, contractual relation between the two. Through the common character of the deeds the grantees are given an interest in a contractual stipulation which is made for their common benefit. *Whitney* v. *Union Railway*, 11 Gray, 359. *Parker* v. *Nightingale*, 6 Allen, 341. *Linzee* v. *Mixer*, 101 Mass. 512. *Dorr* v. *Harrahan*, 101 Mass. 531. *Peck* v. *Conway*, 119 Mass. 546. *Tobey* v. *Moore*, 130 Mass. 448. *Hano* v. *Bigelow*, 155 Mass. 341. *Payson* v. *Burnham*, 141 Mass. 547. *Hopkins* v. *Smith*, 162 Mass. 444. *Hills* v. *Metzenroth*, 173 Mass. 423. The judge was right in finding that the lots owned by the respective parties come within the principle which makes each subject to the restriction, and gives the owner of each a right to enforce the restriction against the others. By agreement of the parties, besides extracts from deeds and deeds in full, different title books, containing abstracts of titles, were put in evidence by the plaintiff. These contained the material facts about many titles, in greatly abbreviated language. It is contended by the defendant that these do not go far enough to establish the facts upon which the plaintiff seeks to rely. But they are entirely intelligible to one familiar with the subject to which they relate, and having been put in evidence without objection, they may be interpreted according to their manifest meaning, although the meaning is not expressed by a full statement in words. The original of the restriction relied upon is found in a deed from the Boston Water Power Company to Whitney and others, trustees, conveying three large parcels of land on the Back Bay, under date of October 16, 1880. We find it, in substantially the same form, in deeds of different parts of this property, one from Whitney and others, trustees, to S. Endicott Peabody, under

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date of June 13, 1883, one to Abbott Lawrence, under date of January 30, 1886, and one to Charles T. Fairchild, under date of March 6, 1886. These three deeds include nearly all of the third parcel conveyed to Whitney and others, trustees, by the Boston Water Power Company. When the land on Newbury Street conveyed to Charles T. Fairchild was subdivided into small building lots, the restriction was inserted in the deeds of the different building lots, and it has been continued in the conveyances since. Deeds from Whitney and others, trustees, of portions of other parcels, included in their purchase from the Boston Water Power Company, contained the same restriction. While not all the conveyances made by Whitney and others, trustees, of lands in this vicinity were put in evidence, there was nothing to show that this restriction was not inserted in their conveyances of the lands out of this third parcel, as a part of a general scheme for the benefit of the whole property, and there was enough in the evidence to show that it was so inserted. The fact that, in some conveyances of parts of their large purchase there were also other restrictions, does not tend to show that this restriction was not intended to apply alike to all, for the benefit of the purchasers. The restriction is therefore valid and enforceable against the defendant.

The proposed garage is designed to accommodate about one hundred and twenty-five automobiles of the larger type. A steel tank, enclosed in cement, is arranged under the front of the building, to hold ten barrels of gasoline. The second floor is designed to be used partly for the storage of automobiles. The rear of the third floor is designed for a repair shop, for making minor repairs of automobiles. The dimensions of this repair shop are about one hundred feet by thirty feet. The southeast corner will contain a small, portable forge. The size of this room is such that from six to eight cars of the largest type may be repaired simultaneously. The building is intended to be used as a salesroom and repository for the Locomobile Company of America. A number of demonstration cars are to be kept, with demonstrators to run them for possible customers. The building is also intended to be used to store and care for automobiles belonging to customers. About seventy-five or a hundred customers are expected to store their automobiles here,

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and these automobiles would go in and out on an average once each day. The judge found that the erection and maintenance of such a garage would be a violation of the restriction. The findings of a judge, made upon the testimony of witnesses who appeared before him, will be followed by the full court unless they are plainly wrong. *Willwerth* v. *Willwerth*, 176 Mass. 265. In the present case, while there was some conflict in the testimony, we are of opinion that the finding was right. There was much evidence tending to show that the business proposed to be carried on at the building would be "offensive to the neighborhood for dwelling houses."

The remaining question is whether there has been such a change in the conditions as to preclude a court of equity from enforcing the restriction. The judge found, and there is no doubt of the correctness of the finding, "that the restrictions in question were imposed by Whitney and others, trustees, in 1886 for the purpose of keeping this property as a residential property as being the use for which it was then believed to be best adapted." The defendant relies on the case of *Jackson* v. *Stevenson*, 156 Mass. 496, in which it was held that, by reason of an entire change in the character of the neighborhood and the use of the property on Pleasant Street and Park Square in Boston, it would be impossible for the plaintiff or others to obtain any benefit from an enforcement of the restrictions, originally imposed in reference to a use of the lots for dwelling houses. The facts of that case were very different from those of the present case. In the present case no use has been shown of any part of the property on which the restriction was put that is in violation of the restriction. There has been a considerable increase of business lately on Massachusetts Avenue, which is a great thoroughfare. A part of Newbury Street between Massachusetts Avenue and Hereford Street was originally left unrestricted, and stables were built there. The proximity of the Boston and Albany Railroad diminishes the desirability of a part of the property on Newbury Street for residences. But these conditions, except the increase of business on Massachusetts Avenue, existed in 1886 when Whitney and others, trustees, made their conveyances. In the absence of any material change in conditions directly affecting the character and use of

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the property in question, this court cannot refuse to enforce the restriction on the ground that it has ceased to be binding.

The judge, in his finding, expressed an opinion that in ten years this part of Newbury Street "will be wanted for business purposes, and is worth more for such purposes than for residential purposes." Whether this opinion as to the future is well founded or not, it is not a good reason for depriving those who have built dwelling houses on their lots, in reliance upon the restriction, of their right to have the adjacent property used in accordance with the provisions of their deeds.

Decree for the plaintiff.

W. R. Evans, Jr., for the plaintiff.

H. R. Bailey, (*G. W. Mathews* with him,) for the defendant.

STERLING ELLIOTT & others *vs.* LORENZO D. BAKER & others.

Suffolk. December 6, 7, 1906. — March 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Equity Pleading and Practice, Memorandum of findings. *Corporation. Equity Jurisdiction*, To cancel corporate shares wrongfully issued.

On an appeal in equity, where the evidence has been taken by a commissioner, a memorandum of findings of fact filed by the justice who heard the case is a part of the record and such findings will not be set aside unless they are plainly wrong.

If in a contest for the control of a corporation a majority of the directors of the corporation sell and issue a large number of shares held in the treasury of the company to a person on their side of the controversy, which with the shares already held and controlled by them will give them control of the corporation, and if the issuing of the shares is not reasonably necessary to raise money to be used in the business of the corporation but the majority of the directors issue the shares in pursuance of a secret arrangement between them and the purchaser of the shares for the purpose of ousting the leader of the opposing party who before such issue had acquired with his friends the control of the outstanding stock of the company, and if the price paid for the new shares while fair under ordinary circumstances is less than probably might have been obtained in view of the contest for the control of the corporation, although the majority of the directors believe that it is for the best interests of the corporation that its control should be in their hands, their action in issuing the shares is in excess

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of their authority and constitutes a breach of trust, and in a suit in equity brought by the opposing stockholders the court will order the cancellation of the certificate for the new shares and the return of the shares to the treasury of the corporation.

The directors of a corporation act in a strictly fiduciary capacity and are held to the high standard of duty required of trustees.

RUGG, J. This is a suit in equity brought by the plaintiffs as stockholders of the Elliott Company in behalf of themselves and all other stockholders, who may desire to join as plaintiffs, to compel the return to the corporation and the cancellation of a certain certificate for nine hundred shares of its capital stock. The justice of this court, before whom the case was tried, filed a memorandum, which includes a report of his findings of fact. Such a memorandum is a part of the record, and its findings stand upon the same basis as those contained in a report and will not be set aside unless they are plainly wrong. *Cohen* v. *Nagle*, 190 Mass. 4. A decree was entered for the plaintiffs, and, the evidence having been taken by a commissioner, the whole case is brought before us on appeal.

The material findings of fact are that there was a contest between two factions among its stockholders for the control of the Elliott Company, a Maine corporation, having its principal place of business in Boston. In April, 1904, the plaintiff Elliott with his friends bought sufficient of the outstanding stock to give them control of the company. The defendant Nickerson, who was in Colorado, returned to Boston, and, learning of this fact, arranged with a majority of the board of directors, who were his friends, to issue for $13 a share, to the defendant Foster, nine hundred shares of stock, owned by and held in the treasury of the company, which, if Foster voted with the Nickerson faction, would give it the control of the corporation. The justice has found that this was not issued in good faith by the directors voting therefor, but to enable Nickerson and his friends to oust Elliott and his friends from the control and give the control to Nickerson; that it was not reasonably necessary to issue the stock to raise money to be used in the business; and that the price, at which the stock was issued to the defendant Foster, while ordinarily fair, was less than probably could have been obtained in view of the peculiar condition of affairs, if other directors and stockholders had been

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allowed to bid. The company thus received less money for it than might have been procured. The stock so issued to Foster was a part of stock formerly issued to Elliott, in payment of certain patents transferred by him to the company, and by him returned into the treasury of the corporation to be disposed of for its benefit in such way and for such price or purpose as the directors might determine. It was contended that this circumstance made a difference as to the rights and obligations of the directors in disposing of it. The justice ruled that this contention was unsound; that the directors were bound to dispose of the stock in good faith and for the best interests of the corporation and, having found as a fact that they did not so dispose of it, that they exceeded their authority in issuing the stock. He found as a further fact that there was a secret understanding or arrangement between the defendants Foster and Nickerson and one Lamson as to the control of the corporation at the time the stock was issued and that the defendant Foster was in some way cognizant of the purpose for which the stock was issued and a party to it. He further ruled that if the directors did not issue the stock in good faith and its issue was not required by the condition of the corporation or reasonably necessary for the proper prosecution of its business, but it was issued to oust Elliott and his friends and to give Nickerson and his friends control, and if Foster was cognizant of and a party to such purpose, then, even though the directors believed that it would be for the best interests of the corporation to have the control in the hands of Nickerson and his friends, their conduct would constitute a breach of trust and the issuing of the stock would be in excess of their authority and a certificate would be invalid in the hands of Foster, notwithstanding he paid what would have been a fair price for the stock under ordinary circumstances. The questions raised are whether the findings of fact are plainly wrong upon the evidence reported, and as to the correctness of the rulings.

This is peculiarly a case for the application of the rule that the justice who hears the witnesses has opportunities for testing their reliability and veracity which no appellate tribunal can acquire. It is stated in the memorandum of the justice that he "cannot believe, though it is denied by all of them, that there

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was not some secret understanding or arrangement between Lamson, Foster and Nickerson in regard to the situation." This finding must have been based not alone upon what was said, but upon a scrutiny of the witnesses, inferences drawn from their appearance, and the atmosphere they created in testifying, which cannot be reproduced in a printed report. A careful examination of all the evidence demonstrates, however, that not only was this finding not plainly wrong but amply warranted. It had been the policy of the company, as stated in its annual report, to keep the issue of stock as low as possible. The company had been increasing its earnings with almost phenomenal rapidity. No reason had been suggested by any of the executive officers of the company why the capital in May, 1905, should have been increased, until, immediately upon its being known that Elliott was trying to buy in the market or perhaps had secured a controlling interest in the stock, one director returns hurriedly from Colorado to Boston, another is summoned by cable from Jamaica, and, as soon as the three constituting a bare majority can get together in Boston, a secret meeting is held at the Parker House. Of this gathering the plaintiff and his friend upon the directorate were given no intimation. It is said to have been then determined that the company needed a larger working capital, although the excess of quick assets over liabilities as shown by the books of the company on April 30, 1905, was $28,538 as against $16,708 on the last day of the previous December. The details of a scheme were planned for issuing to Foster the nine hundred shares of stock owned by the company and held in its treasury. Elaborate preambles and votes were prepared (for use at the meeting of directors to be called as soon as practicable) looking to the election of one of the Nickerson faction in place of Elliott as president, and setting forth the desirability of having Foster as a stockholder and of procuring more money for the company. A meeting of the directors, to be held two or three days later, for the purpose of issuing this stock, was arranged. Foster, not having the ready money with which to purchase the stock, borrowed it through some intermediaries directly from Nickerson, and was present in an outer room, while the meeting of the directors was being held, at which the vote was passed for the

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issuance of the stock to him. The meeting was held after usual bank and court hours. Notwithstanding the protest by two of the five directors against the proceedings, and against issuing any stock without giving to all directors and stockholders an opportunity to purchase, the vote to issue the stock was passed and immediately thereafter the certificate was made out and issued to Foster, who paid in return therefor in bills the $11,700 which had been borrowed from Nickerson. Such haste does not commonly characterize square business dealings. The price at which the stock was issued, although ordinarily a fair one, was not so much as could have been obtained if the directors had taken advantage of the contest for the control of the corporation. This fact was properly regarded as important as bearing upon the good faith of the defendants and tending to show that their primary purpose in issuing the stock was to oust Elliott and his friends from control. It may well be entitled to even greater weight. *The Queen* v. *London & Northwestern Railway*, L. R. 9 Q. B. 134, 145. The circumstances, under which the certificate was paid for and issued, were such as not merely to put a reasonable man on inquiry, but to show irresistibly that Foster as a reasonable man knew of and participated in the scheme afoot. Reasonable men do not carry about in their pockets $11,700 of borrowed money in bills in a city after bank hours and procure therewith for themselves the actual possession of a certificate of stock in a business corporation after usual court hours, unless they know the transaction is such as will not bear investigation.

It is not necessary to pass upon the question whether actual knowledge on the part of Foster or only such circumstances as should have put a reasonable man upon inquiry respecting the want of authority on the part of the directors to issue the stock is necessary in order to render invalid the certificate in the hands of Foster, for the finding that he was a party to the purpose, for which the stock was issued, is fully borne out by the testimony.

There is no error in the rulings of law made. Mere belief that they are acting for the interests of the corporation on the part of a majority of the directors, who at the time represent a minority of the stock then outstanding, does not justify the issuing to confederates of a sufficient amount of stock to give to themselves, and to oust their opponents from, the control of the

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corporation, when the issuance of stock is not required by the condition of the corporation nor reasonably necessary for the proper prosecution of its business. The directors of a corporation act in a strictly fiduciary capacity. Their office is one of trust and they are held to the high standard of duty required of trustees. They cannot be permitted so to manage the affairs of their *cestui que trust* that the system of business corporations, by which so large a part of the world's work is now conducted, "may become a system of frauds." *Peabody* v. *Flint*, 6 Allen, 52, 55. *European & North American Railway* v. *Poor*, 59 Maine, 277. Corporate directors cannot manipulate the property, of which they have control in a trust relation, primarily with the intent to secure a majority of the stock or of directors in any particular interest. This is not a fair exercise in good faith of the power with which they are clothed. *Punt* v. *Symons*, [1903] 2 Ch. 506, 515. This is especially true when the issuance of the stock is for the express purpose of retaining in power the very persons who authorize the issue, and who are therefore distinctly benefited to the disadvantage of another and substantial part of their stockholders. *Gray* v. *Portland Bank*, 3 Mass. 364. *Cannon* v. *Trask*, L. R. 20 Eq. 669. *Luther* v. *Luther Co.* 118 Wis. 112. *Way* v. *American Grease Co.* 15 Dick. 263. The defendants rely upon the principles laid down in *State* v. *Smith*, 48 Vt. 266. Without discussing the soundness of this decision, the facts, upon which it was based, namely, that the sale of the stock was for a necessary purpose and beneficial to the corporation, distinguish it from the case at bar. *Rural Homestead Co.* v. *Wildes*, 9 Dick. 668, also relied upon by the defendants, was a case where the act attacked was found to be beyond reasonable criticism and the purchaser of the stock to be acting in good faith and without notice, the reverse of the situation here disclosed. The decree is to be so far modified as to include the costs of this appeal, and as modified affirmed. *Graves* v. *Hicks*, 191 Mass. 102.

So ordered.

S. J. Elder, for the defendant Foster.

G. L. Mayberry, (*H. Albers* with him,) for other defendants.

S. W. Emery, (*G. K. Bartlett* with him,) for the plaintiffs.

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GEORGE A. GRAVES *vs.* JOHN T. HICKS & another. JOHN T. HICKS, petitioner.

Suffolk. December 7, 1906. — March 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & RUGG, JJ.

Equity Pleading and Practice, Exceptions, Appeal. *Rules of Court.*

The principle of Rule 45 of the Superior Court, formerly Rule 48, providing that, except as there provided, no exception shall be allowed unless alleged and saved at the time when the opinion, ruling, direction, or judgment excepted to is given, should be applied to orders in equity proceedings, especially where the suit in equity is for the purpose of establishing a debt to the plaintiff from the principal defendant and is in substance an action at law.

Where in a suit in equity there is a motion for a new trial, which is denied by the judge, and the party who made the motion appeals from the order and afterwards attempts to file an exception, which cannot be allowed because it was not taken at the time when the order was made, and the same party later appeals from a final decree against him, but the record of the appeal does not set out enough of the proceedings to enable this court to say upon what ground the judge denied the motion for a new trial, the appeal from the final decree brings the appeal from the interlocutory decree denying the motion before this court but discloses no reason for sustaining it.

HAMMOND, J. 1. After a rescript from this court to the Superior Court ordering that the decree from which the defendant Hicks had appealed be, with a certain modification, affirmed, (*Graves* v. *Hicks*, 191 Mass. 102,) the defendant filed a motion for a new trial upon the ground of newly discovered evidence, and that the hearing might be reopened to receive further evidence "by reason thereof." The hearing upon the motion took place on March 23, 1906, before the judge before whom, sitting without a jury, the case was originally tried. It appears from the certificate of the judge disallowing the exceptions that he filed his decision overruling the motion on March 27, 1906, and written notice thereof was mailed by the clerk and received by counsel on the same day; that at the hearing "no exception was taken nor in any way saved nor was there any intimation of a desire to save any exception"; that the "first step toward claiming or saving an exception was the filing by defendant Hicks on April 4, 1906, of a paper entitled 'Claim of Appeal

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and Exception,' in which he recites that he 'both appeals . . . from and excepts to the order, finding, decision and ruling . . . denying his prayers in his petition'"; and further, that "this was filed after the defendant Hicks counsel had received notice of the plaintiff's intention to present for entry a final decree after rescript and only a few hours before the time set for presenting said decree."

There is a difference between saving exceptions and filing them; and the statute which provides that exceptions may be filed within twenty days from the act excepted to has no reference to the time when they should be alleged. In the Superior Court, in actions at common law, the matter is regulated by Rule 48 (now Rule 45) of that court: "No exception shall be allowed by the presiding justice, unless the same be alleged and saved at the time when the opinion, ruling, direction, or judgment excepted to is given. And all exceptions to any charge to the jury shall, unless previously saved, be alleged before the jury are sent out. When further instructions are given in the absence of counsel after the jury have retired, the presiding justice may permit exceptions thereto at any time within twenty-four hours next following. All requests for instructions shall be made in writing before the closing arguments unless special leave is given to present further requests later." As to the meaning of this rule reference may be had to *Keohane, petitioner*, 179 Mass. 69. As said by Bigelow, C. J. in *Joannes* v. *Underwood*, 6 Allen, 241, "this rule is a wise and salutary one"; and we think that the principle should be applied to orders in equity proceedings, especially in a case where, as here, the suit as between the plaintiff and principal defendant is in substance an action at law.* The paper alleging the exception was not filed until eight days after notice of the decision. This was not a reasonable time. The bill of exceptions was therefore rightly disallowed on the ground that the exceptions had not been seasonably taken. *Richards* v. *Appley*, 187 Mass. 521.

* It was a bill in equity to establish a debt alleged to be due from the defendant Hicks to the plaintiff upon a promissory note for $903.80, with interest, and to reach and apply in payment of that debt certain shares of the capital stock of a foreign corporation alleged to belong to the defendant Hicks and also any sum that might be due to him from that corporation.

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2. As to the appeal. The order overruling the motion for a new trial being an interlocutory order and no exceptions having been properly taken, the final decree was properly entered. Upon the defendant's appeal from the final decree the appeal from the interlocutory decree is before us. But the difficulty with this is that the appeal does not set out enough of the record to enable us to say upon what ground the judge overruled the motion; and so far as the record goes it discloses no reason for sustaining the appeal.

It thus appears that because the matter is not properly before us we dispose of this case without considering the merits of the contention of the defendant that the note was paid or satisfied by the settlement of January 24, 1901, and the proceedings thereunder. The plaintiff has, however, produced before us informally the record of the proceedings which took place at the hearing before the judge both upon the original trial and the motion for a new trial. The motion for a new trial was heard upon the sworn petition of Hicks, the affidavits of the plaintiff and of one of his counsel, and a counter affidavit of Hicks, with the exhibits thereto respectively annexed. We have gone over them all carefully; and, while the question whether the agreement of January 24, 1901, originally covered by its terms this note may be a fair one for argument, and while we can see that, whether it did or did not cover the note, the defendant may honestly have thought it did and may still think so, yet, in view of the fact that the negotiations for a settlement were going along for some time; of the nature and consideration of this note; the contents of the paper signed by Hicks on January 30, 1901, considered in connection with the affidavits of the plaintiff and his counsel as to the express statement of the plaintiff at the time the agreement was carried out that this note was not to be included in the settlement and as to the alleged express assent to that proposition by the defendant; and of the further fact that the note was not given up but was retained by the plaintiff, we are satisfied that notwithstanding the affidavits of the defendant and the other evidence in his favor, the weight of evidence is strongly in favor of the proposition that the paper of January 15, 1901, was only one of the steps in the preliminary negotiations and did not contain the elements of the settlement

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finally made; and that, even if the paper of January 24, 1901, covered this note, when the parties met to carry out that settlement it was finally agreed between the plaintiff and the defendant that it should not cover the note, but that the note should still stand as a valid obligation.

Petition to establish exceptions denied; decrees affirmed.

The case was submitted on briefs.

M. J. Creed & J. P. Crosby, for Graves.

J. T. Hicks, pro se.

ATTORNEY GENERAL *vs.* COLONIAL LIFE ASSOCIATION, JOSEPHINE COOPER, claimant.

Suffolk. December 10, 1906. — March 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Insurance, Life. *Fraternal Beneficiary Corporation.*

The provision of St. 1893, c. 434, § 1, now R. L. c. 118, § 73, requiring a copy of the application of the insured referred to in a policy of life insurance to be annexed to the policy as a prerequisite to its being considered a part of the contract or being received in evidence, does not apply to a certificate of life insurance issued by a fraternal beneficiary corporation organized under St. 1899, c. 442, now R. L. c. 119.

In a claim against a fraternal beneficiary corporation for a death benefit, the certificate on which the claim was made declared that it was issued on the condition that the statements made by the member in his application for membership and the statements made by him to the medical examiner, both of which were filed in the sovereign secretary's office, were made a part of the contract and were full and true without any suppression of facts, and on the condition that the member should comply with the laws, rules and regulations governing the corporation. The certificate further provided that it should "be governed by, subject to and construed only according to the constitution, by-laws and regulations" of the corporation. The application for membership signed by the member contained the following statement: "I also consent and agree, that, if a certificate or policy is granted on this application, the same shall not cover . . . death by suicide, whether sane or insane." The by-laws of the corporation then in force provided that "each certificate shall be expressed to be void in the event of suicide, whether the member be sane or insane." It appeared that the member to whom the certificate was issued committed suicide as the result of acute melancholia. *Held*, that by the terms of the contract nothing was due on the claim.

BILL IN EQUITY, filed by the Attorney General at the relation of the insurance commissioner, on April 14, 1905, praying

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for the winding up of the Colonial Life Association, a fraternal beneficiary corporation organized under the laws of this Commonwealth.

The case came on to be heard before *Hammond*, J. upon the receiver's report on claims presented to him, and the justice, being about to enter a decree disallowing the claim of Josephine Cooper for a death benefit under a certificate issued by the defendant to her late husband George H. Cooper, was requested by the claimant to report her claim for determination by the full court. Whereupon, as the final disposition of this claim would affect the amount to be paid to other creditors and the justice was of opinion that its validity should be determined by the full court before further proceedings were taken, he reported it for such determination.

The material facts relating to the claim were reported by the justice as follows:

The certificate under which the claim was made was as follows:

"Colonial Life Association of Massachusetts

2000. *Age 60*

"This Certificate is issued to *George H. Cooper age Sixty* years, a member *of Columbia Colony number Twenty-six*, Colonial Life Association located at *Washington Dist. of Columbia*, upon condition that the statements made by him in his application for membership in said Association, and the statements made by him to the Medical Examiner, both of which are filed in the Sovereign Secretary's Office, are made a part of this contract, and are full and true without any suppression of facts, and upon condition that said member complies with the laws, rules and regulations now governing the said Association and Colony and their respective funds, and such as may hereafter be enacted to govern the same, paying all dues and assessments provided or authorized by the By-Laws of the Association or the Colony to which said member belongs, in the manner and at the stipulated times, and upon condition that the said member for himself and for any person or persons accepting or acquiring any interest in this benefit certificate agrees that no action at law or in equity shall be brought or maintained on any cause or claim arising out of any membership in the Colonial Life Asso-

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ciation or on any benefit certificate, unless such action is brought within one year from the time when the right of action accrues.

"These conditions being complied with, the said *George H. Cooper* is entitled to participate in the beneficiary funds of the Association to the amount of *Two Thousand* dollars in accordance with the provisions of Sec. 11, Chapter 442, of the acts passed by the Legislature of Massachusetts during the Session of 1899, and of any amendment that may be made thereto, which sum the Colonial Life Association hereby promises to pay to *Josephine Cooper, Wife* in accordance with and under the provisions of the laws governing said funds upon satisfactory evidence of the death of said member ninety days after receipt of proof of claim and upon the surrender of this certificate; provided that said member is in good standing in this order at the time of his death, and provided, also, that this certificate is outstanding and in full force.

"In the event of the total permanent disability of said member established to the satisfaction of the Association, while this contract is in full force, there will be paid said member upon the surrender hereof, one-half of the sum aforesaid.

"The General Fund Dues, amounting to $1.00 per quarter, are due and payable upon the first business day of January, April, July and October; and the Mortality Fund Dues, amounting to $4.14, are due and payable upon the first business day of every month to the Treasurer of Columbia Colony, No. *26* at *Washington*, or at the Office of the Sovereign Treasurer in Westfield, Mass.

"The contract hereby made shall be governed by, subject to and construed only according to the constitution, by-laws and Regulations of this Association and the laws of the Commonwealth of Massachusetts, the place of this contract being expressly agreed to be in Westfield, Massachusetts.

"In Witness Whereof, the Colonial Life Association has caused this certificate to be signed by its President and its Treasurer, and to be countersigned by its Secretary, this *Twenty-sixth* day of *January* A. D. *1900*.

"Robt. H. Kneil, President,
"Countersigned by E. S. Goodnow, Treasurer.
E. S. Goodnow, Secretary."

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The application upon which this certificate was issued was dated January 18, 1900, and was as follows:

"I, George H. Cooper, of Washington, D. C., hereby make application for membership and a certificate for $2000. insurance in the Colonial Life Association, and for that purpose make the following statement as the basis of the contract between the said Colonial Life Association and myself."

Then followed numerous questions propounded to the applicant by the medical examiner as to the physical condition, health, and family history of the applicant, which were answered; after which was the following certificate:

"I, George H. Cooper, of Washington, County of Washington, District of Columbia, do hereby declare and warrant that all these particulars and statements are true, and that I have not in this application for above-named contract concealed or withheld any material circumstance or information concerning the past or present state of my health, habits of life, or medical treatment; and I do hereby acknowledge, consent and agree that any untrue or fraudulent statement made above, or to any Medical Examiner of said Colonial Life Association, or any concealment of facts by me, may forfeit and cancel all rights to any benefit under the above-named contract. And I do further consent and agree, that, if a certificate or policy is granted on this application, same shall not become binding on the Association until the first payment due thereon has been actually received by the Association or its authorized organizer, during my lifetime and good health. I also consent and agree, that, if a certificate or policy is granted on this application, the same shall not cover on death arising from intemperance, or at any place forbidden by the Association, or death by suicide, whether sane or insane. I hereby expressly waive any and all provisions of law now existing, or that may hereafter exist, preventing any physician from disclosing any information acquired in attending me in a professional capacity or otherwise, or rendering him incompetent to testify as a witness in any way whatever. I agree that an affidavit of the Secretary of the said Association or of the Secretary of any Colony of said Association that notice of any sums due has been addressed to me at the post-office address appearing on the books of the Association, and that the

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same has been mailed according to the usual course of business of said Association, shall be admitted as evidence, and taken to be and constitute conclusive proof of the sending of such notice in any and all suits brought on said certificate or policy."

No copy of the application was annexed to or delivered with the certificate, nor was any copy of the application ever furnished to George H. Cooper.

The by-laws in force when the certificate was issued and at the time of the death of George H. Cooper, so far as applicable to the question involved, provided as follows:

Article 17: "Every person desiring to become a member must make application according to the prescribed form and the truthfulness of the declarations and statements therein made shall be the basis for the certificate to be issued him."

Article 24, § 1: "All certificates shall be made payable in ninety days from proof of claim. Each certificate shall be expressed to be void in the event of suicide, whether the member be sane or insane, and shall also provide that no proceeding at law or in equity shall be brought on the certificate after the lapse of one year from the date of the death or total disability."

The remaining by-laws were similar to those adopted by other fraternal beneficiary corporations organized in Massachusetts.

George H. Cooper committed suicide. as the result of acute melancholia, on October 12, 1902. Proofs of death were made and submitted to the association. The association refused to pay the claim upon the ground that the member committed suicide. Thereafter an action was brought by the beneficiary in the Supreme Court of the District of Columbia. The association demurred to the plaintiff's declaration, raising the question whether the application should be considered a part of the certificate. The demurrer was sustained, the court holding that the entire application and the certificate constituted one contract. The plaintiff was about to appeal or plead over when the receiver was appointed, after which time no further proceedings were had in the District of Columbia.

A. F. Flint, for the claimant.

H. A. Wyman, for the defendant, submitted a brief.

BRALEY, J. The defendant having been organized under the St. of 1899, c. 442, subsequently R. L. c. 119, as a fraternal

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beneficiary association on the lodge system for the payment of a death benefit to its members, the provision of the St. of 1893, c. 434, § 1, now R. L. c. 118, § 73, requiring a copy of the application for a policy of life insurance to be annexed to the policy, as a prerequisite to its being considered a part of the contract or received in evidence is inapplicable, and the failure to annex a copy to the certificate did not prevent the admission of the application. *Kidder* v. *United Order of the Golden Cross*, 192 Mass. 326. The claimant's rights as beneficiary to prove the amount of insurance which accrued upon the death of her husband depends upon the provisions of the certificate. A perusal of this instrument shows by the recitals in the first paragraph, that it is issued upon the statements made by the insured in his application for membership, and also those made by him to the medical examiner, both of which are filed in the secretary's office, and made a part of the contract. By this reference, the application so far as material is incorporated as if it had been formally repeated, and with the certificate constituted the contract of insurance. *Kidder* v. *United Order of the Golden Cross*, *ubi supra*. *Langdeau* v. *John Hancock Ins. Co.*, *ante*, 56.

While conceding this construction it is the plaintiff's contention that the reference covers only so much of the application as related to the bodily health and physical history of the applicant. But this clause cannot be thus narrowed without violating the sense in which the parties used the language. The condition upon which the certificate is issued rests upon two distinct considerations. They are, the general statements of the insured, and those given by him to the physician. The context that the statements are accepted as being full and true, without any suppression of material facts, while evidently referring to answers contained in the medical examination, do not limit his express offer found in the declaration or statement following the examination that "I also consent and agree, that, if a certificate or policy is granted on this application, the same shall not cover . . . death by suicide, whether sane or insane." Besides, under the by-laws of the defendant then in force it was provided that "each certificate shall be expressed to be void in the event of suicide, whether the member be sane or insane," and the last clause of the certificate stipulates that it "shall be governed by,

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subject to and construed only according to the constitution, by-laws and regulations of this association . . ." It is stated in the report that the insured committed suicide as the result of acute melancholia, and the violation of this subsequent condition worked a forfeiture of the certificate or policy. *Cooper* v. *Massachusetts Ins. Co.* 102 Mass. 227. See also *Daniels* v. *New York, New Haven, & Hartford Railroad*, 183 Mass. 393, 397. The beneficiary being bound by the terms of the contract her claim, therefore, must be disallowed. *Langdeau* v. *John Hancock Ins. Co., ubi supra.*

So ordered.

JOHN C. GRAY & another, trustees, *vs.* THOMAS J. KELLEY.

Suffolk. December 10, 1906. — March 1, 1907.

Present: KNOWLTON, C. J., MORTON, HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Way. Boundary. Deed. Evidence, Extrinsic affecting writings.

The owners in common of a tract of land laid out on it for their own convenience a private way twenty-four feet wide and five hundred and twenty-one feet long leading from a highway on which their land abutted. From time to time they made conveyances of land adjacent to this way on each side, in which they gave the respective grantees "a right to pass and repass at pleasure over any part of said private way of twenty-four feet wide adjoining the premises" conveyed. Thereafter the original owners of the land who laid out the way executed and caused to be recorded a declaration describing the way by metes and bounds, referring to their having laid it out previously, and declaring that they did "set apart and appropriate forever the land occupied by said way twenty-four feet wide as a private way for all the present or future abutters thereon according to our original intention." In a suit in equity by the owner of land on one side of this way against the owner of land on the other side of it, seeking to enjoin the continuous obstruction of the way by carts, sleds and other chattels, it was *held*, that the plaintiff was entitled to have the way remain at all times unobstructed throughout its entire width so that he might pass freely over any part of it.

If two persons, who own in common with another the fee in certain land and in a strip of land twenty-four feet wide adjoining it over which a private way is laid out, convey the principal lot of land to their co-tenant in common by a quitclaim deed which describes the land as bounding upon the private way and grants the right to use such way, reciting that the land is the same intended to be conveyed by a former deed named from one of the grantors to the same grantee, and the description of the land in the deed named plainly does not in-

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clude any part of the way, and the number of square feet of land stated to be conveyed by each of the deeds is the same, the later deed conveys only the land described in the earlier one referred to, and no part of the fee of the land under the private way passes by it.

A guardian was given by the Probate Court a license to sell a certain parcel of land belonging to his ward containing a number of square feet named "with the right in a private way adjoining." The ward owned such a right in a way twenty-four feet wide adjoining the land described and also owned an undivided share in the fee of the strip of land over which the way was laid out. Under this license the guardian executed a deed describing the land and giving its contents in square feet according to plans referred to in former deeds which excluded the strip of land twenty-four feet wide over which the way was laid out, conveying the right of way as follows: "with a free right in common with others thereto entitled to use said private way, subject always to a just share of the expense of keeping the same in good condition and repair." *Held*, that the deed, especially when taken with the license on which it was founded, did not convey or purport to convey the undivided interest of the ward in the fee of the strip of land twenty-four feet wide.

In a suit in equity by one abutter on a private way against another, to enjoin the defendant from obstructing the way by carts, sleds and other chattels, where the deeds creating and defining the right of way describe it without ambiguity as a private way twenty-four feet wide for the benefit of all present and future abutters thereon with the right to pass and repass at pleasure over any part of it, it is proper to exclude evidence offered by the defendant to show that for a period of nearly forty years a predecessor in title of the defendant used one half of the private way practically continuously for the piling of wood and such other uses as he saw fit to make of it.

KNOWLTON, C. J. On January 2, 1850, John W. Warren and Simon Warren became the owners, as tenants in common, of a tract of land lying northerly of Warren Street in Brookline. For their own convenience they laid out a private way, twenty-four feet wide, leading nearly at right angles from Warren Street, a distance of five hundred and twenty-one feet northerly into this tract of land. Under date of June 5, 1862, they executed, acknowledged and caused to be recorded a declaration, with a release of dower by their wives, describing this way by metes and bounds, referring to their having laid it out previously, and saying that they did "set apart and appropriate forever the land occupied by said way twenty-four feet wide as a private way for all the present or future abutters thereon according to our original intention." From time to time previously to August 18, 1851, they made conveyances of land adjacent to this way, on each side, in which they gave the respective grantees "a right to pass and repass at pleasure over any part of said private way of twenty-four feet wide adjoining the

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premises" conveyed. The plaintiffs own the land abutting on the way on the westerly side, and the defendant owns a part of the land abutting on the way on the easterly side. The defendant has placed upon different parts of the way his carts, and sleds and other chattels, and has thereby obstructed these parts of it. The plaintiffs bring this bill to obtain an injunction against the continuance of such obstruction, and they claim their rights as incident to their ownership of the land on the side of the way, and also as owners of the fee of the whole way. The defendant also contends that he is the owner of the fee in the entire way, as a tenant in common with another, and he claims a right to use the way as he has used it.

The first question is: What rights are secured to abutters on the way by the declaration referred to and the deeds made in accordance with it? If the right of a grantee is to have the way, throughout its entire width, remain at all times unobstructed, so that one may pass freely over any part of it, the plaintiffs are entitled to an injunction. If the provisions of the deed are satisfied by leaving the way in such a condition that one can drive through it, without very great inconvenience, notwithstanding obstructions in places, a different result would be reached.

The deeds give a right to have a way, in common with others, whose limits and boundaries are defined, all of which is appropriated and set apart for this use. We think that the language quoted from the deeds, as well as the language of the declaration, requires that the way, throughout its entire width, should be left unobstructed. This seems to be its natural meaning, and similar language has been given such a meaning in the decisions. *Tudor Ice Co.* v. *Cunningham*, 8 Allen, 139. *Tucker* v. *Howard*, 122 Mass. 529. *Nash* v. *New England Ins. Co.* 127 Mass. 91. *Gerrish* v. *Shattuck*, 128 Mass. 571. *Hamlin* v. *New York, New Haven, & Hartford Railroad*, 176 Mass. 514.

These considerations are enough to entitle the plaintiffs to relief, but not to show fully the grounds of their claim nor the extent of their rights. The parties have argued at length the question whether the plaintiffs are the owners of the fee of the way, and this question is expressly reserved by the report. Upon all the evidence the Superior Court ruled, "that the

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plaintiffs own no part of the fee of the way as claimed by the plaintiffs, but that they have an easement in said way which entitles them to have said way kept open and unobstructed to its full width," and ordered a decree for the plaintiffs. A part of the reservation is in these words: "If on the evidence actually admitted in the case, this ruling was correct, and if the exclusion of evidence was correct, the decree is to be entered as ordered."

Numerous conveyances, including many reconveyances, were made from time to time from August, 1851, to December 10, 1879, together covering all the land adjacent to the way on both sides, and it is not contended that any one of these included the fee of any part of the way, although all of them gave an easement in it. On this last date, a quitclaim deed, without warranty, was made from Almira Warren and John W. Warren to Frank C. Warren, of two lots of land, one of which is the lot on the westerly side of this way. The plaintiffs claim under this deed, and contend that it included the fee of the whole of the way because it gave the way as the easterly boundary.

The law has long been well settled that a deed, which bounds the granted premises on a street or public way, conveys the property to the middle of the way if the grantor owns so far, unless there is language in it which indicates that he intends to convey only to the side of the way. The rule is stated more definitely by Mr. Justice Gray, in *Boston* v. *Richardson*, 13 Allen, 146, as follows: "Whenever land is described as bounded by other land, or by a building or structure, the name of which, according to its legal and ordinary meaning, includes the title in the land of which it has been made part, as a house, a mill, a wharf, or the like, the side of the land or structure referred to as a boundary is the limit of the grant; but when the boundary line is simply by an object, whether natural or artificial, the name of which is used in ordinary speech as defining a boundary, and not as describing a title in fee, and which does not in its description or nature include the earth as far down as the grantor owns, and yet which has width, as in the case of a way, a river, a ditch, a wall, a fence, a tree, or a stake and stones, then the centre of the thing so

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running over or standing on the land is the boundary of the lot granted." This shows the fundamental and principal reason of the rule. To this reason is added the probability that the grantor, if bounding on a street, under which the land presumably would be of little value to a private owner, would not be expected to care much to retain the title after parting with all of his property at the side of the street. But this rule has never been held to be anything more than a rule of construction, to be used in ascertaining the true meaning of the parties. For a time it was doubted whether it should apply to conveyances upon a private way; for the reason of it is less strong in its application to such conditions. On this question the court divided in *Fisher* v. *Smith*, 9 Gray, 441. See *Crocker* v. *Cotting*, 166 Mass. 183, 187. But it is now well established that, in case of a conveyance giving an ordinary private way as a boundary, if the title of the grantor extends to the centre of the way, he will be presumed to have intended to pass title to the centre of the boundary, unless there is something in the deed to show a contrary intention. *Peck* v. *Denniston*, 121 Mass. 17. *O'Connell* v. *Bryant*, 121 Mass. 557. *Dean* v. *Lowell*, 135 Mass. 55. *McKenzie* v. *Gleason*, 184 Mass. 452. *Everett* v. *Fall River*, 189 Mass. 513. It is always a question what is the intention of the parties, and ordinarily the intention to retain the title in private land, over which a right of way is granted, is more easily indicated than the intention to limit one's grant by the side line of a public street when the grantor owns to the centre of it. Nothing is ever conveyed except what is included within the boundaries of the lot described, and the language of the deed must be scrutinized, in its application to the locus, to see where the true boundaries are.

The plaintiffs contend that, inasmuch as the grantors in the deed to Frank C. Warren, bearing date December 10, 1879, were the owners in common with him of the fee of the private way, their deed gave him the fee of the whole way. It has been decided in a very few courts that, where a grantor bounds upon a way, of all of which he owns the fee, if he owns no land upon the other side of it, he is presumed to have intended to convey all of the way. This is not in accordance with the decisions in this Commonwealth, and it is contrary to the rule which we have

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quoted from *Boston* v. *Richardson*, *ubi supra*. If one owned land upon which, along one side, there was a private way, we should expect, if he wished to convey the whole, including the way, that he would describe the whole in the deed, saying as to a part, that it was sold subject to the incumbrance of a right of way. If he sold bounding upon the way, he would be estopped from denying, as against the grantee, that it was a way which the grantee might use. But there is little reason for treating a strip of land, over which there is a private way, and which is a part of a larger lot in the same ownership, as technically a monument. In that respect it is very different from an ordinary public street.

We are of opinion that the judge of the Superior Court was right in ruling that the deed on which the plaintiffs rely did not include the fee of the way. In the first place, after describing the land, it recites that it is the "same premises intended to be conveyed to said Frank by John W. Warren by deed dated January 26, 1877, and recorded," etc. This latter deed plainly did not include any part of the private way; for the line runs "on the westerly side of a private way." The object of this later deed, so far as this lot is concerned, seemingly was to release the right which passed on the death of Simon Warren to his mother, Lois Warren, and which was not included in the former deed, but descended to her children from Lois Warren who died after the former deed was made. If we go back to the particular description in the deed, we find in its language that there was no intention to include any more land than was included in the former deed. First, the number of square feet in the land conveyed is stated as the same. Next, as we follow the line from Warren Street to and along the private way, we find a description as follows: "South by the curve making the corner of said street and a private way twenty-four feet wide, nine feet; east by said private way on several lines four hundred and ninety-seven feet six inches; . . . west by land late of John Howe three hundred and ninety-five 7-10 feet." These courses and distances are the same as in the former deed to which reference is made. The principal difference is that the former deed says, in terms, that the course runs "on the westerly side of a private way." But in the later deed we come around on the private

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way "by the curve making the corner of said street and a private way twenty-four feet wide, nine feet." This plainly is a curve on the side line of the private way. From that point we go by the private way, on several lines, four hundred and ninety-seven feet six inches. These seem to be the side lines. Taking all the provisions together, it seems plain that this deed was intended to give the same boundaries as the former one, and to convey only the land on the westerly side of the private way. If Frank C. Warren took no part of the fee under this deed, the quitclaim deed of February 3, 1892, from Bowditch, his guardian, to John L. Gardner, under whom the plaintiffs claim, carried nothing from these grantors.

The question remains whether this guardian's deed included any interest in the fee of the way which Frank C. Warren received as a tenant in common from his ancestors. The license from the Probate Court, through which Bowditch derived his authority, describes the property to be sold as "a parcel of vacant land on the northerly side of Warren Street, in Brookline, containing about 98,776 square feet, with the right in a private way adjoining."

From August 18, 1851, to the date of the first deed specially relied on by the plaintiffs, for more than forty years, the title of the land in the private way was held apart from that on either side. The license plainly shows that the lot to be sold is outside of the way, and that with it is to be sold the right, belonging to it, in the private way adjoining, which is an easement to use the way. The ownership of the fee was merely a holding of an undivided interest as a tenant in common. The description in the deed made under this license is of a parcel whose contents in square feet are given, according to the old plans, the same as in the former deeds that plainly exclude the way, whose courses and distances are given as in the same deeds, whose southeasterly line is given on the curve-line which forms the corner of the private way and Warren Street, and which is on the outer line of the way, and whose description as to the way is, "with a free right in common with others thereto entitled to use said private way, subject always to a just share of the expense of keeping the same in good condition and repair." We are of opinion that this deed, especially when it is taken with the license on which it is

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founded, does not purport to convey the fee of the way in which the ward had only an undivided interest.

The evidence was rightly excluded.* There was no ambiguity in the deeds in reference to the easement included in them.

It follows that the ruling of the Superior Court was correct, and that the decree should be entered in accordance with the order.

So ordered.

The case was argued at the bar in December, 1906, before *Knowlton*, C. J., *Hammond*, *Loring*, *Braley*, & *Sheldon*, JJ., and afterwards was submitted on briefs to all the justices except *Rugg*, J.

R. A. Jackson, for the plaintiffs.

T. W. Proctor, for the defendant.

HARRY A. BROWN, trustee, *vs.* JAMES H. WRIGHT & others.

Middlesex. December 10, 1906. — March 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Devise and Legacy. Adoption. Perpetuities. Equity Pleading and Practice, Costs, Counsel fees. *Words*, "Right heirs."

The rule of construction that the republication of a will by a codicil does not alter the meaning of the words of the will does not apply when the clause of the will to be construed has been changed by the codicil.

Where a will provides that after the death of the testator's widow, the income of a portion of his estate shall be paid to the testator's son, his only child and heir presumptive, that the income of the remaining portion of the estate shall accumulate during the life of the testator's son, and that on his death, leaving no issue surviving him, the trustee for the time being shall pay over and distribute all that shall remain of the property to the testator's "right heirs at law," the persons so described are to be ascertained as of the date of the death of the testator's son.

A testator made a will, when he had two sons living, providing that, after the

* The defendant offered to show that from 1866 for pretty nearly forty years John Warren, junior, used the easterly half of the private way, against the land of John L. Gardner, practically continuously for the piling of wood and such other uses as he saw fit to make of it, both during the life of John L. Gardner, senior, and afterwards. The judge excluded the evidence subject to the defendant's exception.

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termination of the life interests created by the will for the benefit of his wife and of his two sons and the payment of certain legacies, the trustee for the time being should pay over and distribute all that should then remain of his property and estate to the issue of his two sons, or failing such issue, to the testator's "right heirs at law." On the death of one of his sons leaving no issue, the testator made a codicil ratifying and confirming his will except so far as changed by that instrument, in which, among other changes, he expressly revoked the provisions for his deceased son and his issue, and gave the remainder of his property and estate to the trustee named in his will "to be held, managed and disposed of as trustee in said will provided excepting so far as changed and modified by this codicil." He gave to his surviving son, after the death of the testator's wife, the income of $20,000 instead of the income of $10,000 given him by the will, provided for additional bequests to be paid after the death of the testator's wife and changed one of his executors. At the time of making the codicil the testator was an old man and acted on the assumption that his surviving son would be his only child at the time of his death. After the death of the testator's wife and the payment of legacies to be paid at that time, there was left in the hands of the trustee a fund of about $50,000, and, on a bill for instructions by the trustee, this court held that the income of the estate over and above the income on $20,000 which was given to the testator's son for life was to be accumulated until the time of his death. On the death of the testator's son without issue, the trustee brought a bill for further instructions as to who were the testator's "right heirs at law" among whom the fund should be distributed. *Held*, that the fund should be distributed among those persons who would have been the heirs at law of the testator had he died at the time of the death of his son.

Under R. L. c. 154, § 7, the adopted daughter of a deceased brother of a testator cannot share in a bequest to the heirs of the testator.

The effect of the word "right" in a bequest to a testator's "right heirs at law," which apparently was used to exclude the possibility of a construction including an adopted child, here was not passed upon because the adopted child of a deceased brother of the testator was not an heir at law of the testator in any case.

A testator made a bequest to his son of the income of a certain fund for life and "should he die leaving a widow and children" then during the life of his widow the income was to go in equal parts to the widow and children with a remainder over to the children in fee, "but if he should die leaving no issue but leaving a widow" then to his widow for life, with a remainder after the payment of certain legacies to the issue of the testator's son, or, failing such issue, to the testator's right heirs at law. The son died leaving no widow and no issue. *Held*, that the gift over to the testator's heirs was subject only to the life interest of the testator's son and conditioned on his dying leaving no issue, and was not void for remoteness.

In a suit in equity by a trustee under a will for instructions as to the distribution of a fund, where costs as between solicitor and client are allowed to the parties out of the fund, if nephews and nieces of the testator and children of deceased nephews and nieces whose interests are identical choose to be represented by four different counsel, only one set of costs should be allowed to them all.

LORING, J. Nathan M. Wright, by his last will made in 1885, gave to his wife for life certain real estate in Lowell and the income of $5,000 with power to use the principal; to his

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son George P. $100 a year during the life of his [the testator's] wife, and after her decease the income of $10,000 for his [George P.'s] life; and "should he die leaving a widow and children," then during the life of his widow the income of this $10,000 was to go in equal parts to the widow and children with remainder over to the children in fee; "but if he should die leaving no issue but leaving a widow," then to his widow for life; and to his son Albert certain bequests. The rest and residue was left in trust for his wife for life; on her decease certain legacies were to be paid, and then the income of what was left was to be paid to Albert for life. "And after the termination of all the life estates herein given bequeathed and devised, and the payment and satisfaction of all the special and specific legacies above given and bequeathed, my trustee or trustees for the time being shall pay over and distribute all that shall then remain, if any remainder there be of my property and estate to the issue of my said sons George P. and Albert D. Wright to be theirs absolutely, or failing such issue, to my right heirs at law, to have and to hold to them, their heirs and assigns forever."

At the date of the will the testator was seventy years old and his wife sixty-five; they had been married for twenty-five years and had lived together during that time without having had a child. The two sons George P. and Albert were sons of the testator by a former wife.

Three years later, in November, 1888, his son Albert died leaving no issue.

In April of the following year the testator made a codicil, in which, after reciting the death of Albert and of another legatee, he gave (*inter alia*) $15,000 in place of $5,000 to his wife for life, with power to use the principal. The codicil then provides that: "Whereas in items 6 and 7 (six and seven) of said will I made certain other bequests to my said son, Albert D. Wright and made other provisions for him and his issue, I now revoke the same in such respects and give and bequeath the same, save as herein specially excepted, to John F. Kimball, the Trustee named in said will, to be held, managed and disposed of as trustee as in said will provided excepting so far as changed and modified by this codicil." He gives to George the income of $20,000 in place of $10,000 after the death of his [the testator's]

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wife. He then provides for additional bequests to be paid after the decease of his [the testator's] wife, and changes one of his executors. It should be added that the codicil begins with the statement that he makes this codicil, "hereby ratifying and confirming my said will in all respects save as changed by this instrument."

A bill for instructions was brought by the trustee after the death of the wife and the payment of the legacies directed to be paid at that time. In that suit it appeared that there was left in the hands of the trustee some $50,000, and this court held that by the true construction of the will and codicil the income, over and above the income on $20,000 given to George P. for life, was to be accumulated. *Brown* v. *Wright*, 168 Mass. 506. George P. is now dead, never having been married and leaving no issue him surviving. This bill is brought by the trustee asking the instructions of the court as to the distribution of the trust fund which he alleges consists of about $38,000 personalty and $12,000 real estate. The case was reserved for our decision by a single justice of this court.

The fund is claimed on the one hand by the executors of and the devisees under the will of George P. on the ground that the "right heirs at law" are to be ascertained as of the testator's death and therefore that the interest in the remainder was vested in George P. and passed under his will.

It is claimed also by ten nephews and nieces, the son of a deceased niece, and three infant children of a deceased nephew, on the ground that the right heirs of the testator are to be ascertained as of the decease of George P. Wright, the last of the life tenants.

Anna E. Fay is the adopted daughter of a brother of the testator. She claims under the will of George P. Wright and also that she is an heir of the testator if the estate goes to the heirs as of the date of the death of the life tenant.

It is plain from the provisions of the will and codicil, and especially from the provisions of those instruments read in the light of the circumstances, that the codicil was made in the expectation that his son George would be his only child.

The first contention of those who claim under George P. Wright is that the gift over now in question to heirs is found in the will; that it must have the same construction under the

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will and codicil that it originally had under the will, since the construction of the clause is not affected by the change in circumstances intervening between the will and codicil; that the gift to the right heirs of the testator in the will was originally a gift over, after life estates in different parts of the trust, to the two sons, subject to the life estate in the widow on failure of issue of both sons; that under those circumstances the general rule obtains as to the date as of which heirs are to be ascertained, however it may be when the gift over to heirs is made after a life estate in the sole heir presumptive and a failure of issue on his part.

They rely in support of this contention on *Harvard Unitarian Society* v. *Tufts*, 151 Mass. 76, *Pendergast* v. *Tibbetts*, 164 Mass. 270, and on the general proposition that a republication of a will by a codicil under changed circumstances will not alter the construction of the will. That is true, but in our opinion it does not apply in this case. In this case the codicil did alter the very clause now under discussion. It revoked the bequests given to Albert and "the other provisions for him and his issue," and gave and bequeathed the trust estate as provided in the will, "excepting so far as changed and modified by this codicil."

The change thereby made in this clause of the will was to make it a gift over on the failure of the issue of George, the sole heir presumptive, to the right heirs of the testator after a life estate to George the sole heir presumptive in $20,000, being a part of the trust estate, which life estate was subject to a life estate in the whole trust estate in the widow.

The gift here in question is substantially the same as that in question in *Heard* v. *Read*, 169 Mass. 216. In this case there is the prior life estate in the widow, and in effect a direction to accumulate all income above the income on $20,000 given for life to the sole heir presumptive. In *Heard* v. *Read* one half was given to a person named and the other half only to the heirs of the testator.

In both cases there are no words of present gift to the heirs, but the gift to the heirs is made by way of a direction to pay over and distribute only. In both cases the gift over to heirs is made after a life estate in the sole heir presumptive.

The differences between the two cases do not seem to us to be

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material. The direction to accumulate the income over and above the income on $20,000 tends to strengthen the conclusion that the remainder in the whole was not to vest in the sole heir presumptive who was limited to a part of the income only.

We are therefore of opinion that the heirs are to be ascertained as of the date of the termination of the life estate.

We are also of opinion that Anna E. Fay, the adopted daughter of the deceased brother, does not take as one of the right heirs of the testator.

By the terms of R. L. c. 154, § 7, the adopted daughter of a deceased brother of the testator would not inherit the testator's real estate as representing that deceased brother. This is conceded by the defendant Fay. Her argument is that an heir is the equivalent of a child within R. L. c. 154, § 8 (for which she cites *Wyeth* v. *Stone*, 144 Mass. 441), and that from the other provisions of this will it plainly appears to have been the intention of the testator to include her as provided in R. L. c. 154, § 8. The inquiry as to whether it did or did not plainly appear to have been the intention of the testator to include the adopted child arose in *Wyeth* v. *Stone*, *ubi supra*, because the bequest there in question was to the heirs of the testator's wife who adopted as a son the person who claimed as her heir. Here the gift over is to the testator's heirs, not to his brother's heirs, and for that reason this case comes within § 7 and not within § 8. For that reason it is not necessary to have recourse to the word "right" heirs, inserted apparently to exclude the possibility of the contention here made or of any similar contention. As to the meaning of "right heirs" see *Owen* v. *Gibbons*, [1902] 1 Ch. 636, 647, 648; *Garland* v. *Beverley*, 9 Ch. D. 213, 220; *McCrea's estate*, 180 Penn. St. 81, 83.

We are of opinion that the gift over to the right heirs is not void as being too remote.

The gift over to the right heirs of the testator was not a gift over after a life estate in George P. Wright followed by a life estate or life estates during the life of his widow in his widow and children or in his widow alone. The life estate to his widow and children or to his widow alone were each of them expressly made conditional on his dying leaving a widow and children or a widow alone. If those conditions or one of them did not hap-

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pen, there was no gift to the widow or to the children, and the gift over to heirs was subject to the life estate of George P. Wright only, conditioned on his dying and leaving no issue him surviving. That gift over is not void for remoteness. *Gray* v. *Whittemore*, 192 Mass. 367. *Miles* v. *Harford*, 12 Ch. D. 691, 703.

The amount of the fund should be ascertained in the Probate Court. *Green* v. *Gaskill*, 175 Mass. 265. When it is ascertained it should be distributed under the decree of this court. The nephews and nieces and the children of deceased nephews and nieces whose interests are identical have chosen to be represented by four counsel. But one set of costs as between solicitor and client should be allowed out of the fund for them all.

Decree accordingly.

The case was submitted on briefs.

H. Dunham, for James H. Wright and others.

F. W. Qua & S. E. Qua, for the executors of and the devisees under the will of George P. Wright.

M. Storey & J. L. Thorndike, for William H. Wright.

J. J. Pickman, for Frank B. Wright and others.

F. E. Dunbar & G. H. Spalding, for Anna E. Fay.

A. M. Lyon, for Mary A. Gallant, guardian.

ANNA M. COOLIDGE, administratrix with the will annexed, *vs.* HENRY F. KNIGHT, administrator *de bonis non* with the will annexed.

HENRY F. KNIGHT, administrator as above, *vs.* ANNA M. COOLIDGE, administratrix as above.

Middlesex. December 10, 11, 1906. — March 1, 1907.

Present: KNOWLTON, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Gift. Trust. Savings Bank.

One having deposits in more than fourteen savings banks caused seven of them to be transferred to himself in trust for certain persons respectively named as beneficiaries and in most of the cases executed an assignment in writing to himself as trustee for the beneficiary named. He kept all of the bank books representing these deposits in his own possession while he lived and drew out the in-

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terest for his own use. When he died these books were found in his trunk among his other effects. During his lifetime he made oral statements tending to show that at his death he intended the books to go to the persons respectively named in them as beneficiaries. He had transferred to another person seven other savings bank accounts, in each case delivering the bank book and never having it again in his possession or drawing anything from the account. *Held*, that these facts warranted a finding that there was no perfected gift of any of the accounts represented by the bank books retained by the deceased, and that no trust was created, so that the title to these accounts remained in the deceased at the time of his death.

TWO APPEALS by Henry F. Knight, administrator *de bonis non* with the will annexed of the estate of Thomas Livermore, late of Watertown, from two decrees of the Probate Court for the county of Middlesex, one from the allowance of the account of the administration of that estate by Emma L. Magee, executrix of the will of Thomas Livermore, filed after the death of Emma L. Magee, by Anna M. Coolidge, administratrix with the will annexed of her estate, and the other from the order of the Probate Court denying a petition by Knight, as such administrator, against Anna M. Coolidge, as such administratrix, that she be ordered to retain the assets of the estate of Emma L. Magee to satisfy his claim.

The case was heard by *Loring*, J. It was agreed by the parties that the only question that should be raised in either of the cases as involved in the appeals was whether any or all of the savings bank books enumerated below, or the proceeds thereof, or the moneys represented thereby, were assets of the estate of Thomas Livermore, or whether any or all of them were the property of the various beneficiaries named in such savings bank books. If any or all of them were at the time of the decease of Thomas Livermore assets of his estate, then Anna M. Coolidge, administratrix of the estate of Emma L. Magee, as such administratrix, was to be charged in her account for each of the savings bank books or the proceeds thereof with accrued interest, or the funds represented thereby, so far as each of them should be so found to be assets, but that she should be required to pay over to the petitioner, Henry F. Knight, administrator, only so much of the amount for which she was so charged as should be sufficient to pay a legacy of $5,000, mentioned in the second clause of the will of Thomas Livermore, and such sum as might be necessary to cover the debts and expenses of adminis-

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tration of his estate, including the administrator's compensation and such compensation as the Probate Court might allow for him and his attorney in this and other matters, provided that the administrator should receive a release or discharge from the estate of Martha Magee of any liability under the residuary clause of the will of Thomas Livermore.

The savings banks books in question were as follows:

No. 20408. Warren Institution for Savings standing in the name of Thomas Livermore in trust for Mary E. Bond.

No. 8036. Newton Savings Bank standing in the name of Thomas Livermore in trust for Mary L. Adams.

No. 10203. Waltham Savings Bank standing in the name of Thomas Livermore in trust for Maria Coolidge.

No. 2179. Watertown Savings Bank standing in the name of Thomas Livermore in trust for Anna M. Barnes.

No. 30305. Charlestown Five Cents Savings Bank standing in the name of Thomas Livermore in trust for Martha Magee.

No. 7646. Boston Penny Savings Bank standing in the name of Thomas Livermore in trust for Martha Magee.

No. 183010. Boston Five Cents Savings Bank standing in the name of Thomas Livermore in trust for Martha Magee.

Each of these accounts originally stood in the name of Thomas Livermore. He caused them to be transferred to himself as trustee for the several persons named as beneficiaries, and in most of the cases executed an assignment in writing to himself as trustee for the person named as beneficiary. Thomas Livermore had accounts in savings banks other than the seven mentioned above. Seven of these other accounts he transferred to Alice M. Farnham, at whose house he lived during the ten years next preceding his death, in each case delivering the book to her and never having it again in his possession or control anything from the account.

Present: KNOWLTON.

More never was married, and always lived in as a mechanic, and the property he acquired as a mechanic and from his savings, except his brother William Livermore. He was so far as known did not keep any regu- lar account. He gave up work at the age of seventy and lived on the income from his savings. He died on September 18,

One having deposits in more than one savings bank may be transferred to himself in trust for the several beneficiaries and in most of the cases executed an assignment in writing to himself as trustee for the beneficiary, thereby presenting these deposits in his own name.

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1903, when more than eighty-five years of age. He left a will, executed on July 18, 1898, which was proved in the Probate Court for the county of Middlesex, and Emma L. Magee was appointed executrix of the will. The first, second and third clauses of the will were as follows:

"1st. I give and bequeath to my brother William Livermore the sum of five dollars, as he has ample means of his own, and does not require anything from me.

"2nd. I give and bequeath to my sister, a widow, Catharine Webster of Wellesley, Mass., the sum of five thousand dollars to her sole use, and behoof forever.

"3rd. The balance of my estate, both real and personal of which I may be possessed at the time of my decease, whether the same shall be in Savings Banks, cash on hand or in notes of any person or persons I give, bequeath and devise to my beloved sister Martha Magee, wife of James W. Magee of Watertown, Mass., to her sole use and behoof forever. She may possess and enjoy the whole principal and interest as to her may seem best, and she shall not be responsible to any other person whomsoever for the same. But if the said Martha Magee shall die, before my decease, then the sum that will become hers, under this will, shall revert to her daughter Emma Magee to her sole use. And I, appoint the aforesaid Emma Magee of Watertown the Executrix of this my will and she shall not be required to give sureties on her official bond."

The justice made certain findings which are stated and referred to in the opinion, and made a final decree declaring that the seven savings bank books described above and the accounts and moneys represented thereby were assets of the estate of Thomas Livermore, and that Emma L. Magee as executrix of the will of Thomas Livermore was chargeable with the amount of those accounts, and ordering that Anna M. Coolidge, administratrix with the will annexed of the estate of Emma L. Magee, should account to Henry F. Knight, administrator *de bonis non* with the will annexed of the estate of Thomas Livermore, for such bank books and accounts or the value thereof, and that Knight, administrator as aforesaid, should recover his costs. Anna M. Coolidge, administratrix with the will annexed of the estate of Emma L. Magee, executrix, appealed.

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W. A. Abbott, for Anna M. Coolidge.

B. N. Johnson, for Henry F. Knight.

HAMMOND, J. Under the stipulation of the parties, the sole question left for our consideration is whether Thomas Livermore, to whom the seven savings bank accounts in controversy originally belonged, made during his lifetime a perfected gift of them, or any of them, to the respective beneficiaries. The case was heard, upon evidence largely oral, by a single justice of this court.

All of the bank books were kept by Livermore while he lived, and after his decease they were found in his trunk among his other effects. He treated the accounts as belonging to him. As to his intention the justice found that even "where the alleged beneficiary was notified, there was no intention on the part of Thomas Livermore to hold the several books in trust for himself for life and subject thereto in trust for the several beneficiaries. On the contrary I find as a fact that it was his intention to keep the full control of the several books in question during his life, and to give the books to the several beneficiaries on his death. In other words, that the case does not come within the class of cases of which *Gerrish* v. *New Bedford Institution for Savings*, 128 Mass. 159, would be one if the evidence there held to be admissible was believed, but to the class of cases of which *Nutt* v. *Morse*, 142 Mass. 1, is an example." This finding must stand unless it appears to be clearly wrong. But it is not necessary to invoke in this case that principle of practice. We have carefully examined the evidence and are satisfied that the finding was clearly right.

The interest on these various accounts was added every six months to the principal by the respective banks, and it appeared that for years after the alleged gifts and up to the time of his death, Livermore in every account drew out, on the day on which the interest was thus added, or within a very few days thereafter, a sum equal to the amount of the interest. He went to the banks and drew out this interest in person, except the last year before his death, in which year he from time to time gave an order to Mrs. Farnham with whom he boarded, and she went to the bank and drew the money for him. As a rule he receipted for the money in his own individual name, and with one or two

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exceptions signed the orders in the same way. With the exception of the account in the Boston Five Cents Savings Bank it is not shown that he ever receipted in any other way. In one or two instances Mrs. Farnham added the word "trustee" or its abbreviation "Tr." to his name upon an order, but that was at the suggestion of the bank after her arrival there, and it does not appear that he ever knew it; and in one or two cases, at least in one instance, the word "Tr." appears after his name, but in a different ink and a handwriting differing from that of the body of the signature. In a word, he kept the books and in all ways seems to have treated the accounts as if they belonged to him.

It is argued, however, in behalf of the accountant that although he made a perfect gift of the principal, still it was with the reservation of the income during his life. But one of the troubles with that view of the transactions is that in the case of several of the accounts the written assignment was of the interest as well as the principal, and in none is there expressed any such reservation. The assignment of the account in the Warren Institution for Savings, for instance, is of the deposit book "together with all moneys due thereon, both principal and interest." The order to the Newton Savings Bank is to pay to Mrs. Adams "all moneys that have been or may be deposited, together with the interest that may become due on" the account. While it is true that Mrs. Bond-Foote testified that at the time Livermore exhibited the books in the presence of herself, her mother and her sister Emma, he said that he should take the interest as long as he lived but when he was gone the books should respectively belong to them, still, in view of the whole circumstances disclosed we must regard the whole language uttered by him on that occasion as indicating not an intention on his part to make a then present gift of the principal so as to pass it irrevocably out of his hands, but as indicating what he supposed would happen after his title to the principal had ceased by his death. And in calling a book "Maria's book," we understand that he meant not that the book then actually belonged to her, but simply that upon his death he intended that it should go to her. In all this we find no then present gift of any part of the account represented by the books.

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Livermore apparently was not unacquainted with the manner in which a gift of a book account could be properly made. When he had concluded to give an account to Mrs. Farnham he proceeded in a proper way and made an effectual gift. It is unprofitable to rehearse the evidence further.

In view of the facts that the books were kept in his possession, that he treated the accounts as his own and under his control until his death, that he knew how to make a perfected gift when his object was to pass the title from him in his lifetime (as shown in his gift to Mrs. Farnham), and of the other material circumstances, we are of opinion that the finding of the single justice was correct, and that it was not Livermore's intention to pass the title either to the principal or the interest of any of these accounts during his lifetime. There was therefore no perfected gift. The title remained in him at the time of his death. *Nutt* v. *Morse*, 142 Mass. 1. *Bailey* v. *New Bedford Institution for Savings*, 192 Mass. 564, and cases there cited.

Decree affirmed.

CHARLES S. HOLMES & others *vs.* EVER M. HOLMES & another.

Suffolk. December 31, 1906. — March 1, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Equity Jurisdiction, For an accounting. *Probate Court. Trust. Devise and Legacy. Equity Pleading and Practice*, Decree. *Words*, "Legal heirs."

Although this court has no jurisdiction as a court in equity to compel a probate accounting, yet, where a trust fund created by a will has been diverted from the possession and control of the trustee and has passed into the hands of a devisee of one of the *cestuis que trust*, parties claiming the whole or parts of the fund as against each other may come into equity to secure the preservation of the fund and to have their respective rights determined, leaving the final accounting to be had and the net amount of the trust fund to be determined in the Probate Court.

Where under the provisions of a will one of the beneficiaries of a trust has a right to receive one third of the fund in the hands of the trustee at a certain date, and two or three weeks before this date the trustee conveys and transfers to this beneficiary the whole of the fund without authority to do so, the beneficiary and those holding under him should not be compelled to return the third of the fund to which he rightfully is entitled merely because it was conveyed to

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him prematurely and because other property to which he is not entitled was conveyed with it.

A testator died leaving both real and personal estate. A widow and a son survived him. He devised and bequeathed all his property to a trustee, and directed the trustee at the expiration of "five years to divide one third of all my estate between my said wife and son in proportions of one third thereof to my wife and two thirds thereof to my son. At the expiration of ten years from my decease to divide one half of my estate then remaining in the hands of my said trustee between my said wife and son in the same proportions. At the expiration of fifteen years to divide all the remainder of my estate between my said wife and son in the same proportions. If either my wife or son should die before the expiration of fifteen years to pay to the survivor the deceased person's share. If both should die before the expiration of said fifteen years to pay over all my estate to the legal heirs of the survivor as soon after his decease as may be found practicable." The testator's widow waived the provisions of his will, and died within three years after the death of the testator. His son died more than five years and less than six years after the death of the testator, leaving a widow and no issue. The heirs by blood of the son claimed the remainder to his "legal heirs" to the exclusion of his widow. *Held*, that on the expiration of five years from the death of the testator the testator's son became entitled to one third of the fund, that on his death the remaining two thirds vested in his legal heirs to be determined at the date of his decease, and that these were the persons who would have been entitled to inherit his real estate if he had died intestate, which included his widow and gave her under St. 1900, c. 450, § 4, now embodied in R. L. c. 140, § 3, cl. 3, one half of the remainder.

Where a will contains a limitation of a fund consisting of both real and personal property to the "legal heirs" of a person named and there is no indication that the real estate and the personal property are to be treated separately, the whole of the fund goes to those persons who under the laws in force at the time of the death of the person named would be entitled to inherit his real estate if he had died intestate.

Under St. 1900, c. 450, § 4, now embodied in R. L. c. 140, § 3, cl. 3, a widow sharing in a gift to the "legal heirs" of her husband is entitled to one half of the property, and the provision in regard to her first taking $5,000, which relates only to personal property, has no application.

In a suit in equity by the heirs by blood of a certain person against his widow and the trustee under the will of his father, seeking to compel the widow to return to the trustee a certain trust fund the whole of which was conveyed and transferred to her by the trustee, if it appears that the widow is entitled to two thirds of the fund and that the plaintiffs are entitled to the other third of it, the court will order a decree to be entered declaring the rights of the parties, and, if the plaintiffs desire it, ordering the widow to convey and transfer to the trustee a sufficient part of the fund to enable him to account in the Probate Court and to pay and convey to the plaintiffs the share to which they are entitled, but the court will not require the widow to reconvey the whole of the fund to the trustee in order that he may return to her two thirds of it after deducting necessary expenses.

BILL IN EQUITY, filed in the Supreme Judicial Court on September 25, 1903, by the legal heirs by blood of William D.

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Holmes, late of Braintree, against Ever M. Holmes, the widow of William D. Holmes, and George H. Mellen the trustee under the will of William A. Holmes, the father of William D. Holmes, praying that the defendant Mellen as trustee under the will of William A. Holmes might be ordered to account to the plaintiffs and that both the defendants might be ordered to transfer and convey to the plaintiffs all the property both real and personal belonging to the trust created by the will of William A. Holmes and to release all right and title thereto.

The case came on to be heard before *Sheldon*, J., who reserved it upon the pleadings, a master's report and the exceptions thereto for determination by the full court, such decrees and orders to be entered as law and equity might require.

The case was submitted on briefs.

S. K. Hamilton & T. Eaton, for the plaintiffs.

H. Parker & F. H. Nash, for the defendants.

SHELDON, J. William A. Holmes died on August 21, 1897, testate, leaving both real and personal estate. He devised and bequeathed all his property to a trustee to whom he gave full control and power of management, with authority to continue a business formerly carried on by the testator. He then directed the trustee "to pay over to my wife Ellen C. Holmes and to my son William D. Holmes, each the sum of fifty dollars ($50) on the last day of each and every month for the period of five years after my decease, allowing the remainder of said income, if any, to accumulate and become a part of the principal of my estate. At the discretion of my said trustee said monthly payments may be increased to either or both my wife or my son. At the expiration of said five years to divide one third of all my estate between my said wife and son in proportions of one third thereof to my wife and two thirds thereof to my son. At the expiration of ten years from my decease to divide one half of my estate then remaining in the hands of my said trustee between my said wife and son in the same proportions. At the expiration of fifteen years to divide all the remainder of my estate between my said wife and son in the same proportions. If either my wife or son should die before the expiration of fifteen years to pay to the survivor the deceased person's share. If both should die before the expiration of said fifteen years to pay over all my

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estate to the legal heirs of the survivor as soon after his decease as may be found practicable."

The testator's widow, Ellen C. Holmes, seasonably waived the provisions of this will, and one third of the personal estate, which did not exceed the sum of $10,000, was paid over to her. She died in March, 1900, testate, leaving William D. Holmes her sole heir at law and sole legatee. The defendant Mellen, in April, 1902, was duly appointed trustee under the will of William A. Holmes, and received the personal property belonging to the trust estate, amounting to something over $3,000. The remainder of the trust fund consisted of six parcels of real estate, the appraised value of which was about $22,000. On the fourth day of August, 1902, being seventeen days before the expiration of the first period of five years mentioned in the will of William A. Holmes, the defendant Mellen, as such trustee, at the request of William D. Holmes, delivered to him all of the personal property and conveyed to him all of the real estate in question, without receiving any consideration therefor. William D. Holmes died on May 20, 1903, leaving a widow, the defendant Ever M. Holmes, and no issue, and leaving a will by which he bequeathed all his estate to his widow; and she still holds all of the personal property and the record title to the real estate.

The plaintiffs are all the heirs by blood of William D. Holmes, and they seek by this bill to have the property so conveyed to him by the trustee and now held by the widow impressed with the original trust in their favor, on the ground that they are his only legal heirs to the exclusion of his widow; and they ask that the defendant Mellen be ordered to account to them for the trust estate, and that both defendants be ordered to transfer and convey to them all the property, both real and personal, belonging to the trust estate.

The first question arises upon the defendants' contention that this court has no jurisdiction over the subject matter of the bill. They contend that what the bill seeks is in effect to compel an accounting in this court as a court of equity, and that the original jurisdiction in such a matter is only in the Probate Court, and that the accounting must be had there. *Greene* v. *Brown*, 180 Mass. 308. It is true, as was stated in that case,

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that this court has no jurisdiction as a court of equity to compel a probate accounting, and so cannot upon this bill give to the plaintiffs a full and final remedy for the complete enforcement of all the rights to which they may be entitled. *Green* v. *Gaskill*, 175 Mass. 265, 269, and cases there cited. But in this case the trust fund has been diverted from the possession and control of the trustee and has finally passed into the hands of a devisee of one of the *cestuis que trust*. Adversary claims to beneficial interests under the original limitation are made by the plaintiffs and the defendant Ever M. Holmes. Although the extent and amount of the plaintiffs' interest in the fund are disputed, it is not denied that they have a beneficial interest; and they well may come into equity to secure the preservation of the fund, and to have their rights and those of Mrs. Holmes determined, although the final accounting must be had and the net amount of the trust fund determined in the Probate Court. *Brown* v. *Wright*, *ante*, 540. *Wilson* v. *Boylston National Bank*, 170 Mass. 9. *Tyler* v. *Wheeler*, 160 Mass. 206, 210. *Foster* v. *Bailey*, 157 Mass. 160. *Thorndike* v. *Hinckley*, 155 Mass. 263. *Newell* v. *West*, 149 Mass. 520. *Ammidown* v. *Kinsey*, 144 Mass. 587. *Murray* v. *Wood*, 144 Mass. 195.

The widow of William A. Holmes, having seasonably waived the provisions of her husband's will, became entitled at once to receive, as she did receive, one third part of the personal estate from the executor of his will, and this amount never became part of the trust fund. And whatever property was left by her at her decease passed by her will to her son and sole heir, William D. Holmes. If any of this property remained at his death it has now under his will become vested absolutely in the defendant Ever M. Holmes.

William D. Holmes was still living on August 21, 1902, when the period of five years after the decease of his father expired. His mother having waived the provisions of the will, it became on that day the duty of the trustee to turn over to him one third part of the trust fund. The right to receive this third part of the trust fund was on that day vested in William D. Holmes, alike whether his remainder before that time had been vested or contingent; and it is not necessary to consider whether it was vested or contingent. If contingent, it yet would become

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vested at the end of each five year period as to the one third part which then was to be paid over; if vested, it was liable, as to all parts to which the right had not thus become finally vested, to be divested by his decease before the expiration of fifteen years from the death of his father. He became accordingly the rightful owner of one third part of the trust fund on August 21, 1902. See *Welch* v. *Brimmer*, 169 Mass. 204; *Claflin* v. *Claflin*, 149 Mass. 19; *Sears* v. *Putnam*, 102 Mass. 5. The fact that the trustee had a few days before paid and conveyed to him the whole fund did not diminish his right. The final direction given by the will to the trustee, "if both [the widow and the son of the testator] should die before the expiration of said fifteen years to pay over all my estate to the legal heirs of the survivor," can refer only to that part of his estate which should not have been already paid over or which had not already become finally vested at the expiration of the respective five and ten year periods. Just as the survivor of the wife and the son, if the former had not waived the provisions of the will, would take only what had not been paid over or become vested under the previous limitations, so the rights of the heirs of the survivor under the final provision must be similarly limited. It follows that although the conveyance of August 4, 1902, was made by the trustee without right, yet William D. Holmes the grantee therein named was, after August 21, 1902, the rightful owner and holder of one third part of the property named therein; and, as his right has passed to his widow the defendant Ever M. Holmes, she ought not now to be disturbed in her enjoyment of that part of the original trust fund.

It is not disputed, however, that as William D. Holmes died on May 20, 1903, the remaining two thirds of the trust fund, together with the income thereof, vested beneficially on that day in his legal heirs; and the question arises who are the parties entitled to take under that designation. We think it is plain that under this limitation the heirs are to be determined as of the date of his decease, and are the persons who, under the laws then in force, would have been entitled to inherit his real estate if he had died intestate. *Blodgett* v. *Stowell*, 189 Mass. 142, 143. *International Trust Co.* v. *Williams*, 183 Mass. 173. *Proctor* v. *Clark*, 154 Mass. 45. *Lincoln* v. *Perry*, 149 Mass. 368. *Dove* v.

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Torr, 128 Mass. 38. The fund consists of both real and personal property; there is no indication that more than one class is intended by the term "legal heirs," or that the real estate and the personal property are to go in different directions; the circumstances are like those which were found in *Clarke* v. *Cordis*, 4 Allen, 466, and *Lombard* v. *Boyden*, 5 Allen, 249; and the rule of those cases should be applied and the whole property should go to those who are technically to be described as heirs. See the cases cited in *Gray* v. *Whittemore*, 192 Mass. 367, 380. Except however in the case of husband and wife, the distinction between heirs and distributees ordinarily would not be important under our present legislation. R. L. c. 140, § 3, cl. 3. *Parkman* v. *McCarthy*, 149 Mass. 502.

The plaintiffs are the heirs by blood of William D. Holmes; the defendant Ever M. Holmes is his widow. The act of 1900, c. 450, § 4, now embodied in R. L. c. 140, § 3, cl. 3, was then in force: "If the deceased leaves no issue, the surviving husband or widow shall take five thousand dollars and one-half of the remaining personal property and one-half of the remaining real property. If the personal property is insufficient to pay said five thousand dollars, the deficiency shall, upon the petition of any party in interest, be paid from the sale or mortgage, in the manner provided for the payment of debts or legacies, of any interest of the deceased in real property which he could have conveyed at the time of his death." Under the Pub. Sts. c. 124, § 3, the widow of one who died intestate and without issue, but leaving kindred, was entitled to take his real estate in fee to an amount not exceeding $5,000 in value, and also to have a life estate in one half of the other real estate of which he died seised, or, if she so elected, to her dower in his real estate other than that taken by her in fee. Under this statute she took the real estate in fee to the value of $5,000 in addition to her right of dower, and was an heir of her husband to that extent; but the life estate in one half of his other real estate, though vesting in her and making her a tenant in common with his heirs, was given to her as a substitute merely for her dower and was not taken by her as an heir, because she took no estate by inheritance. See *Elliot* v. *Elliot*, 137 Mass. 116; *Cochran* v. *Thorndike*, 133 Mass. 46; *Sears* v. *Sears*, 121 Mass. 267; *Eastham* v. *Barrett*, 152 Mass. 56. The

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widow then would be entitled, as heir of her husband under such a limitation as that, to real estate to the value of $5,000, but she had no further rights. *Proctor* v. *Clark*, 154 Mass. 45. *Olney* v. *Lovering*, 167 Mass. 446. In this respect the rights of husband and wife in each other's estate were the same. See *Gray* v. *Whittemore*, 192 Mass. 367, 381 *et seq*; *Smith, petitioner*, 156 Mass. 408; *Lavery* v. *Egan*, 143 Mass. 389.

Under the statute in force both now and at the time of the death of William D. Holmes, the only estate of inheritance given to the widow of one dying intestate and without issue is one half of his real property. R. L. c. 140, § 3, cl. 3. The $5,000 which is given to her is to be paid out of the personal property, although, if that is insufficient, it is made a charge upon the real estate to the extent of any deficiency. She has merely a right of action against the administrator for the payment of the $5,000, with the further right to insist that if necessary the real estate shall be sold or mortgaged to provide for any deficiency in the fund available for her payment. She takes no estate of inheritance in any real estate under this provision. But she does take an estate of inheritance in one half of his real estate, and as to this, in conformity to the principles which were established by the decisions above cited made under Pub. Sts. c. 124, § 3, she must be regarded as a statutory heir of her husband. This has been expressly held with regard to the further provision of the statute that if the deceased leaves issue a surviving husband or widow shall take one third of the remaining real property. *International Trust Co.* v. *Williams*, 183 Mass. 173. Manifestly a different canon of construction cannot be applied to the clause of the statute here in question.

It follows that the defendant Ever M. Holmes is entitled, as a statutory heir of her husband, he having died without issue, to one half part of that portion, being two third parts of the trust fund, which was without right in his possession at his death, and is now held by her. To the other half part of that portion of the fund with the accrued income the plaintiffs are entitled. That is, the plaintiffs are entitled to one third part of the trust fund as it was constituted when conveyed in 1902 by the trustee to William D. Holmes; and the defendant Ever M. Holmes is entitled to the other two thirds thereof, one of these third parts

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having come to her as the sole devisee and legatee of her husband in whom it had become vested during his lifetime, and one being held by her as a statutory heir of her husband.

It is unnecessary to consider the plaintiffs' exceptions to the master's report in detail. They all are covered by what has been stated. A decree may be entered declaring the rights of the parties in conformity with this opinion. If the plaintiffs desire it, they are entitled to have a sufficient part of the trust fund conveyed to the trustee or to any successor of his who may be appointed by the Probate Court to enable him to account in that court and to pay and convey to them the share to which they are entitled; and, if they desire it, this may be included in the decree. It would be useless, however, to require Mrs. Holmes to reconvey everything to the trustee merely to enable him to convey back to her two thirds thereof less perhaps what expenses might necessarily be incurred.

Decree accordingly.

ROBERT H. RANDALL & others *vs.* ADAMS D. CLAFLIN.

Suffolk. January 9, 1907. — March 1, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Contract, Performance and breach. *Option. Evidence.*

In an action for the alleged breach of a contract in writing to purchase at an agreed price one fourth of the capital stock of a corporation formed to utilize an invention of a machine for cutting cloth in case a certain lawyer should give an opinion that the invention was patentable, it appeared that the lawyer named gave an opinion in writing in substance to the effect that the invention was a new one but that whether it was patentable or not depended upon the practical question to be determined by experts whether the device was an important one for use in cloth cutting machines. *Held*, that this was not an opinion that the invention was patentable and that the defendant was not bound to purchase the stock.

In an action for the alleged breach of a contract in writing under seal to purchase at an agreed price one fourth of the capital stock of a corporation which the plaintiffs were about to form to utilize an invention of a machine owned by them in case a certain lawyer should give an opinion that the invention was patentable, and providing further that, if the lawyer should give an

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opinion that the invention was not patentable, the defendant should have an option to take and pay for the stock, and that the defendant should determine whether he would or would not purchase the stock as soon as the opinion of the lawyer was received, provided the opinion was unfavorable, it appeared that the corporation was formed in the manner contemplated and represented all the interest of the plaintiffs in the invention, that before the opinion of the lawyer was given there was in the stock book of the corporation an unissued certificate for one quarter of the shares of the capital stock of the corporation made out in the name of the defendant, that the lawyer gave an opinion which was not an opinion that the invention was patentable, that thereupon the defendant told one of the directors of the corporation, who was the son of the treasurer of the corporation, that he had decided not to go on with the contract, that the son of the treasurer narrated this conversation to the treasurer, who was one of the parties to the contract, that the defendant himself afterwards stated his decision to the treasurer, that thereupon the treasurer had the defendant sign an indorsement on the back of the unissued certificate in the stock book which had been made out in his name, that thereafter the shares were treated as stock in the treasury of the corporation, and that for eight years the plaintiffs, although seeing the defendant frequently, never questioned his determination or suggested that he was liable under the contract. *Held*, that the defendant was not required by the contract to give formal notice to the plaintiffs either in writing or orally of his determination not to purchase the stock, and that his indorsing the certificate, thereby relinquishing his right to the stock, was an overt act sufficiently communicating such determination. *Held, also*, that the conversation between the defendant and the son of the treasurer, afterwards communicated to the treasurer, in which the defendant told the son of his decision not to go on with the contract was admissible in evidence against the plaintiffs.

Where a letter of a deceased person contains statements which under R. L. c. 175, § 66, are admissible in evidence for the purpose of contradicting the material testimony of a witness, the fact that the letter also contains irrelevant matter does not make the relevant portion of it inadmissible.

CONTRACT to recover damages for the alleged breach of a contract in writing in refusing to purchase from the plaintiffs one quarter of the capital stock of the National Cloth Cutter Company. Writ in the Supreme Judicial Court dated January 3, 1905.

The contract declared upon was as follows:

"Agreement between Adams D. Claflin, party of the first part, and Robert H. Randall, Calvin E. Randall, Preston C. Morse and William L. Coolidge, parties of the second part, Witnesseth:

"Whereas, the parties of the second part are the owners of a certain invention, relative to the cutting of cloth, under an agreement, to which reference is hereby made and

"Whereas, they have agreed to contribute a one-quarter part

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of the stock of the corporation, hereafter to be formed, for the purpose of providing funds in the treasury of said corporation; and

"Whereas, said Adams D. Claflin desires to purchase a one-quarter interest, provided the firm of Fish, Richardson & Storrow shall advise that the said invention is patentable:

"Now Therefore,

"1. Said Claflin hereby agrees to pay into the treasury of said corporation, as soon as the same is formed, the sum of one thousand ($1,000.) dollars.

"2. In case said Fish, Richardson & Storrow shall give an opinion that said invention is patentable, said Claflin agrees to pay into the treasury of said corporation the further sum of eleven thousand, five hundred ($11,500.) dollars, as soon as said opinion is given; said payment of eleven thousand, five hundred ($11,500.) dollars may be made in installments upon the written consent of all the parties hereto.

"3. In case said Fish, Richardson & Storrow give an opinion that said invention is patentable, said Randall, Randall, Morse and Coolidge hereby agree to deliver to said Claflin, as soon as said Claflin shall have paid into the treasury of said corporation said sum of eleven thousand, five hundred ($11,500.) dollars, each one-sixteenth part of the entire capital stock of said corporation.

"4. In case said Fish, Richardson & Storrow give an opinion that the invention is not patentable, said Claflin may, at his option, pay into the treasury of said corporation the said sum of eleven thousand, five hundred ($11,500.) dollars, in which case said Randall, Randall, Morse and Coolidge shall each deliver to said Claflin, upon payment thereof, one sixteenth part of the entire capital stock. Said Claflin shall determine whether he will or will not purchase said stock as soon as the opinion of Fish, Richardson & Storrow is received, provided the opinion is unfavorable.

"5. In case the opinion of Fish, Richardson & Storrow is to the effect that said invention is not patentable, and said Claflin decides not to purchase the said stock, the said sum of one thousand ($1,000.) dollars shall become the property of said corporation, and said Claflin shall have no further interest therein.

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"This agreement shall be binding upon the parties hereto and upon their respective heirs, administrators and assigns.

"Witness our hands and seals this third day of February, A. D. 1896."

Here followed the signatures and the seals of the parties.

The case was tried before *Barker*, J., and the following facts, among others, appeared in evidence:

On February 14, 1896, the corporation referred to in the contract was organized under the laws of the State of Maine, under the name of "National Cloth Cutter Company," with a capital stock of $200,000, consisting of four thousand shares of the par value of $50 each.

On March 4, 1896, the plaintiff Morse filed an application for a patent on his cloth cutting machine, and on March 24, 1896, he assigned his rights under this application to the National Cloth Cutter Company, requesting that the patent issue in the name of the company. This patent was issued on June 29, 1897, and comprised the same claims discussed in the opinion of Messrs. Fish, Richardson and Storrow hereafter referred to.

On March 5, 1896, the defendant paid $1,000 into the treasury of the National Cloth Cutter Company, in pursuance of the contract.

On March 14, 1896, the defendant was elected president of the National Cloth Cutter Company, W. L. Coolidge, W. H. Coolidge, O. H. Durrell and the defendant were chosen directors, and W. L. Coolidge was chosen treasurer. Each of these had subscribed for one share of stock on February 14, when the company was organized.

Certificate No. 9, made out in the name of Adams D. Claflin for nine hundred and ninety-nine shares, was signed by the defendant Claflin as president and by W. L. Coolidge as treasurer, under date of March 14, 1896, but never was torn from the stock book stub, nor was it ever delivered to the defendant, nor did he ever sign any receipt for it.

On August 1, 1896, an application was made for a patent on improvements in the machine by the plaintiffs Morse and Calvin E. Randall. They assigned their rights under this application to the National Cloth Cutter Company on August 21, 1896, and a patent was issued on this application on June 15, 1897.

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The opinion of Messrs. Fish, Richardson and Storrow, called for by the contract, was rendered on or about February 2, 1897. The opinion consisted of a letter signed "Frederick P. Fish," addressed to W. H. Coolidge and dated February 2, 1897. The substance of this letter is described in the opinion of the court.

Directly after receiving the opinion of Mr. Fish, W. H. Coolidge handed it to the defendant, who kept it two or three days and went over it carefully by himself, and also spent one evening upon it with W. H. Coolidge. The defendant contended that the opinion was not such an opinion as would compel him to go ahead and make further payment under the contract, and that at that time he decided he would not go ahead, and that this decision was communicated to W. L. Coolidge by W. H. Coolidge, and shortly afterwards by the defendant to W. L. Coolidge.

About February 17, 1897, the defendant and W. L. Coolidge talked over the defendant's relation to the company, in view of the fact that an annual meeting was soon to take place, and it was understood between them that the defendant should drop out as an officer of the company. At the request of W. L. Coolidge the defendant indorsed on the back certificate No. 9, for nine hundred and ninety-nine shares, under date of February 19, 1897.

On February 24, 1897, W. L. Coolidge wrote to C. A. Hight, the clerk of the corporation in Portland, a letter in which he said: "Enclosed find my proxy and I expect to send you more to-morrow or next day. Mr. Claflin has given up all but one of his shares so he will not send proxies. The 999 shares which Mr. Claflin had have not been issued to any other person as yet."

At the annual meeting held on February 27, 1897, Messrs. W. L. Coolidge, W. H. Coolidge and O. H. Durrell were elected directors, and W. L. Coolidge was elected president and treasurer of the company.

About a week after this annual meeting, on March 4, 1897, W. L. Coolidge and the plaintiffs signed a paper as follows:

"Natick, March 4, 1897.

"We, the undersigned, owners of 250 shares each of the National Cloth Cutter Company, which shares have stood on the books of said Company in the name of Adams D. Claflin,

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hereby agree that said stock shall become treasury stock to be used for the benefit of said Company.

"W. L. Coolidge, Preston C. Morse, R. H. Randall,
C. E. Randall."

This paper was in the handwriting of W. L. Coolidge. About a year after his death, which occurred on March 4, 1904, the original stock book of the company was found in the office of W. H. Coolidge, and the foregoing paper was found in it pinned to certificate No. 9, for nine hundred and ninety-nine shares in the name of the defendant. The certificate never had been detached from the stock book and was not receipted for, but bore upon the back an assignment running to the treasurer of the National Cloth Cutter Company signed by the defendant under date of February 19, 1897, and witnessed by W. L. Coolidge. This stock book was put in evidence.

The defendant testified in his own behalf. On his direct examination he was asked the following question: "You say you had this conversation with Mr. W. H. Coolidge and went over this contract carefully: will you state what you said to Mr. Coolidge in regard to it?" This question was objected to by the plaintiffs, and was allowed by the justice subject to the plaintiffs' exception. The defendant answered as follows: "I stated to Mr. W. H. Coolidge that in view of the uncertainty or indecisiveness of the opinion, and the many questions and possibilities raised by the opinion, I didn't consider that it met the requirements of the contract, or met my requirements in satisfying me as to the status of the patents and I therefore should not be able to go on, didn't feel able to go on, under the contract, and that I should expect to forfeit my $1,000 already paid in as called for by the contract and cease my connection with the matter."

The witness went on to testify in substance as follows: "After my conversation with Mr. W. H. Coolidge, I met Mr. W. L. Coolidge in the Boston office of Strout and Coolidge and confirmed to him what I had stated to Mr. W. H. Coolidge. W. L. Coolidge made no comment on my statement other than shaking his head up and down. I understood him to acquiesce in my decision. I saw Mr. W. L. Coolidge after that almost every day for a long time; from that time on Mr. W. L. Coolidge

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made no demands on me in connection with this contract or its performance; he never alluded to the matter thereafter."

W. H. Coolidge, who was called as a witness by the defendant, having testified that after the opinion of Fish, Richardson and Storrow was given he had a conversation with the defendant in regard to it, was asked on his direct examination the question "What did he say?" This question was objected to by the plaintiffs and was admitted by the presiding justice. "A. I can't remember the language; I know the substance of it. — Q. State, as near as you can, the substance. A. The substance was that this wasn't the kind of a report he was going in on, that this wasn't the kind he expected to go in on; that there were questions in regard to whether it would infringe some old patent; there were questions in regard to how much value it was, whether it was useful, and how easily it might be got around; and that on the whole he didn't think he ought to go in."

The witness testified that after having this conversation with the defendant he told his father all about it; told him that the defendant and he had had a talk, and what the defendant said and what the witness said.

The defendant was recalled, and stated in regard to signing his name on the back of certificate No. 9 on February 19, 1897, that he remembered that after talking with W. H. Coolidge and subsequently with W. L. Coolidge, W. L. Coolidge and the witness talked over the witness' relation as an officer of the company, in view of the fact that an annual meeting was pretty soon to take place, and it was understood between them that of course the witness should drop out as a director and officer of the company at that annual meeting, as the witness' connection with the company was to be entirely severed owing to his not taking the option under the contract. As nearly as the witness could fix that conversation it must have been somewhere in the latter part of February. It was as a result of that conversation that the witness signed the transfer on the certificate, and he did not send a proxy to the meeting, as he was not supposed to have any further connection with the stock.

The defendant then offered the following letter, signed by O. H. Durrell previously mentioned, who died three or four

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years before the trial, which was admitted subject to the plaintiffs' objection and exception:

"Boston, March 6, 1897.

"W. H. Coolidge, Esq.,

"Dear Mr. Coolidge: — I had a talk with your father today regarding the company. The question arose about the amount due Raymond, namely, $150.50, whether any portion of it is to be assumed by you; and then regarding the bill of Mr. Fish of $417. whether that would be assumed by Mr. Claflin or the company. From the fact that Mr. Claflin has forfeited his $1000., it seems to me that this ought to be a bill for the company to pay. Would you kindly let me know when the note for $1200. given J. C. Cushing, matures?

"Mr. Randall told me that your father suggested giving Mr. Claflin 80 shares of stock from the treasury. It seems to me, however, that as Mr. Claflin of his own volition did not see fit to buy the quarter interest, that we ought not to give him any shares of the treasury stock.

"I will do all I can to make the company a success. As soon as Mr. Winslow decides will you let me know, for if he thinks it better not to have anything to do with it, we will look elsewhere.

"With regards,

"Yours truly,

O. H. Durrell."

At the close of the evidence the plaintiffs asked the justice to make the following rulings:

"1. Upon all the evidence in the case, as a matter of law, the plaintiffs are entitled to recover.

"2. Upon all the evidence in the case, as a matter of law, the letter of Frederick P. Fish, Esq., to William H. Coolidge, dated February 2, 1897, was an opinion that the invention referred to in the contract in suit was patentable.

"3. If the jury find that the scissors cut in the Morse machine is a substantial advantage in the machine, and an advance in the art, then the opinion rendered by Mr. Fish would be an opinion that this invention was patentable, and the plaintiffs are entitled to recover upon proof of the other allegations of their declaration."

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The justice refused to make any of these rulings, and instructed the jury that the opinion given by Fish, Richardson and Storrow was not such an opinion as required the defendant to make his payment of $11,500 into the treasury of the company, giving also, among other instructions, those which are quoted and described in the opinion of the court. The jury returned a verdict for the defendant; and the plaintiffs alleged exceptions, which after the death of *Barker*, J. were allowed under R. L. c. 178, § 108, by *Morton*, J.

W. R. Bigelow, for the plaintiffs.

C. A. Hight, (*G. S. Selfridge* with him,) for the defendant.

KNOWLTON, C. J. This is an action upon a contract in writing, whereby the defendant agreed with the plaintiffs and one William L. Coolidge, who were the owners of an invention and of the capital stock of a corporation formed for the purpose of utilizing the invention, to pay $11,500 and receive one fourth of the capital stock of the corporation in case Fish, Richardson and Storrow should give an opinion that the invention was patentable. Under the contract the defendant also had an option to pay the money and take the stock if Fish, Richardson and Storrow should give an opinion that the invention was not patentable, and in reference to that the language of the contract is as follows: "Said Claflin shall determine whether he will or will not purchase said stock as soon as the opinion of Fish, Richardson and Storrow is received, provided the opinion is unfavorable."

The first question which arises is whether they gave an opinion that the invention was patentable. As to this the presiding justice instructed the jury as follows: "It is not a question whether the invention is patentable or not, but whether Messrs. Fish, Richardson and Storrow will say that it is in terms; and what they say, in substance, about it, as I construe it, is that this is a new invention, but that whether it is patentable or not depends upon certain practical things, the value of certain practical things, which they know nothing about; and if they are sufficiently valuable then it is patentable, and if not, then it is not. So they do not give, it seems to me, an opinion that the invention is patentable." There is little to be added to this brief characterization of the opinion given by Fish, Richardson and

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Storrow. An examination of it will show that, while the writer of it found in the invention much to commend, he carefully refrained from giving an opinion upon certain questions which he stated, and which should be answered affirmatively in order to render the invention patentable. He made the patentability of the invention depend on whether "such a 'scissors' cut . . . is a substantial advance in the art." He then said, "It is a practical question to be determined by mechanical experts as to whether or not there is in this class of machines such a decided advantage in a 'scissors' cut. I myself express no opinion on that point, for it is outside of my province." He stated as his conclusion "that if, as a matter of fact, the peculiar arrangement and combination of the cutting blades of the Morse machine is very important in cloth cutters, the first nine claims are of corresponding importance and would protect the manufacturer of the Morse machine against the competition of other machines having this peculiar cutting organization. If a reciprocating cutter having a long plunging stroke and toward the end of its stroke cooperating with a stationary blade to make a 'scissors' cut is not important, then the claims are not important."

We are of opinion that this instruction of the justice was correct, and we thus dispose of the plaintiffs' three requests for rulings, and of their exceptions to the rulings given on this part of the case.

The next question is whether there was error in the instructions in regard to the defendant's determining whether he would or would not purchase stock. The jury were instructed that there was nothing in the contract that required him to give notice to anybody whether he made that determination or not, and that "it is not necessary that he should give an explicit notice, either in writing or orally, either to all of the signers or to any of them. It is necessary that, in addition to making the decision in his own mind, he should do something so that that might become properly known, and so that thereafter he could not dispute but that he had made that decision." He further told the jury that, if, deeming the opinion unfavorable, he decided in his own mind that he would not go on, and "if, having come to that determination in his own mind, he did communicate that to Mr. W. H. Coolidge, and it came to the knowledge of Mr.

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W. L. Coolidge, who was treasurer at that time of the corporation, and thereupon, having that knowledge, Mr. W. L. Coolidge, the treasurer, had him sign the assignment on the back of the certificate in the book, and that was considered between them as an act which he had done in relinquishing his right to the stock, that would be such an overt act as would be a sufficient communication of his determination." This had reference to an assignment of one fourth of the capital stock of the corporation, for which there was an unissued certificate in the stock book standing in his name, and which he indorsed over for use by the corporation soon after the receipt of the opinion from Fish, Richardson and Storrow. This is to be taken in connection with the undisputed evidence that, long before that time, a corporation had been formed by the plaintiffs and their associate W. L. Coolidge, with whom the defendant contracted; that this corporation represented all the interest of the plaintiffs in the invention; that W. H. Coolidge, a son of W. L. Coolidge, who had acquired a half interest in his father's stock, was one of the directors, who acted for himself and others in the business, and to whom the opinion of Fish, Richardson and Storrow was given, and with much other evidence from which it ought to be inferred that all the plaintiffs very early had knowledge of the defendant's determination not to purchase the stock. We are of opinion that the justice was right in ruling that no formal notice to the plaintiffs was necessary, and that it was enough if the defendant promptly came to the determination, and did some overt act which would bind him so that it might become properly known. There was uncontradicted evidence that the plaintiffs went on without him, for nearly eight years, and that, although seeing him frequently, no one of them ever questioned his determination or suggested that he was liable under the contract.

The conversation with W. H. Coolidge was competent. He was acting in the interest of himself and the plaintiffs in procuring the opinion, and he was one of the directors of the corporation. He narrated the conversation to his father, W. L. Coolidge, another of the directors and the treasurer of the corporation, and one of the joint signers with the plaintiffs of the contract on which this action is brought.

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The letter from Durrell to W. H. Coolidge was competent. It was the declaration of a deceased person, and it tended to contradict material testimony of R. H. Randall, one of the plaintiffs. That it contained irrelevant matter does not render the whole letter inadmissible.

Exceptions overruled.

BOSTON WATER POWER COMPANY & trustees *vs.* CITY OF BOSTON.

Suffolk. January 10, 1907. — March 1, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Contract, Performance and breach. *Municipal Corporations*. *Taxes*, Assessments for benefits.

In an action against a city for an amount awarded as damages for land taken for the laying out of a street with interest on the award from the time the defendant began the construction of the street, the defendant set up an instrument under seal executed by the plaintiffs and other landowners whereby they agreed as follows: "We, . . . in consideration of the immediate laying out and construction of said proposed street at the width of fifty feet, . . . and of any assessments which may be laid upon our several estates for the cost of said laying out and construction being delayed until the damages caused to us severally by the taking of said land and the cost of the construction of said street shall be determined, and of said damages being offset against the proportionate part of said cost which may be levied upon our respective estates, agree that the payment for said damages shall be delayed until the balance due from us severally after making said offset has been determined." It appeared that the street was laid out and constructed within a reasonable time, but that no assessment for betterments was made until after the action was begun, when betterments were assessed under a statute which was enacted after the work was done. The assessment was valid and exceeded in amount the damages awarded to the plaintiffs. The betterments might have been assessed sooner, but the plaintiffs never had requested an assessment nor asked for a determination of the balance due from them. The plaintiffs contended that as the defendant had not made the assessment promptly they were entitled to interest on their award for damages from the date of the beginning of construction and were not obliged to set off their damages against the betterments. *Held*, that the setting off of one claim against the other and determining the balance was to be done by the parties jointly, and that the plaintiffs could not hold the defendant delinquent in failing to assess the betterments promptly until the plaintiffs had requested an accounting and a determination of the balance and the defendant had failed to assess the betterments within a reasonable time after such request. *Held, also*, that the fact that the assessment was

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made under a statute enacted after the work was completed was immaterial, as the writing bound the parties in regard to any assessment lawfully made to meet the expenses of the laying out and construction of the street, and such an assessment could be made under a statute passed after the work was done.

CONTRACT by the Boston Water Power Company, a corporation, and Moses Williams and John H. Storer, trustees under certain indentures with that corporation, against the city of Boston for the sum of $35,603 awarded to the corporation as damages from the laying out and construction of Peterborough Street in Boston, with interest from November 16, 1896. Writ dated November 13, 1902.

The defendant's answer in addition to a general denial alleged "that if any land of the plaintiffs was taken for a street and a building line established as alleged, no award was made therefor, but said land was taken and said street laid out in accordance with a written agreement with the city and the street commissioners, signed by the plaintiffs and the other owners of land to be taken, the substance of which agreement was that the street was to be laid out and constructed by the city, that the plaintiffs and the other owners would give the land for the street at prices fixed by the agreement, that nothing was to be paid until after the street was constructed and the cost ascertained, that then the cost of construction and the cost of the land, at the values fixed upon by the agreement, were to be assessed upon the abutters and each one was to be credited with the value of his land taken for the street and was to pay to the city or be paid by the city the difference between the value of his land and the amount of his assessment; and the defendant says that said street has not yet been constructed or such assessment made and that until then it is impossible to ascertain what, if anything, is due the plaintiffs."

The facts are stated in the opinion, where the material part of the instrument signed by the plaintiffs is quoted.

In the Superior Court the case was submitted to *Pierce*, J. upon the pleadings, an agreed statement of facts and the exhibits referred to therein. The judge found for the defendant, and at the request of the parties reported the case for determination by this court. If the finding was warranted upon the agreed statement of facts and the exhibits therein referred to,

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judgment was to be entered thereon; otherwise, such order was to be made as law and justice might require.

C. F. French, for the plaintiffs.

T. M. Babson, for the defendant.

KNOWLTON, C. J. This is an action to recover the amount awarded to the plaintiffs as damages for laying out Peterborough Street in Boston, and the interest on the award from December 2, 1896, the date when the defendant entered on the plaintiffs' land to construct the street. Before the adoption of the order by the board of street commissioners, the plaintiffs and others signed and delivered a writing, like that which appears in *Aspinwall* v. *Boston*, 191 Mass. 441, 444, and in *Averill* v. *Boston*, 193 Mass. 488, 491.

The board of street commissioners laid out the street and the city constructed it within a reasonable time, in accordance with the terms of this writing, but no assessment of betterments was made until after the commencement of the present action. Soon after the action was begun, betterments were assessed, under St. 1902, c. 527, and the assessment upon the plaintiffs, about the legality of which no question is made, exceeds the amount of the damages which they seek to recover. The question is whether, under the contract signed by the plaintiffs, they are obliged to set off their damages against the betterments. The practical difference between the contentions of the parties is that, in one view, the plaintiffs would recover a large sum for interest, and in the other view they would receive no interest.

The adoption of the order, including the assessment of land damages, followed by a seasonable construction of the street, was an acceptance of the plaintiffs' proposal in writing, in all the substantial matters to which the writing relates. This part of the writing is as follows: "We, . . . in consideration of the immediate laying out and construction of said proposed street at the width of fifty feet, . . . and of any assessments which may be laid upon our several estates for the cost of said laying out and construction being delayed until the damages caused to us severally by the taking of said land and the cost of the construction of said street shall be determined, and of said damages being offset against the proportionate part of said cost which may be levied upon our respective estates, agree that the payment for

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said damages shall be delayed until the balance due from us severally after making said offset has been determined." The validity of such a contract, if accepted and performed by a city, is not now in question. *Aspinwall* v. *Boston*, 191 Mass. 441. *Boston* v. *Simmons*, 9 Cush. 373. *Bell* v. *Boston*, 101 Mass. 506. *Driscoll* v. *Taunton*, 160 Mass. 486. Everything in terms required to be done by the city, under the contract, was seasonably and properly done. The only thing which the contract calls for that has not been done is the determining of the balance due from the plaintiffs and others to the city, after making the offset. The contract assumes that the city will assess betterments, and that the amount assessed will be so great that there will be a balance due to the city after setting off the land damages. There is an implied agreement on the part of the city that it will make such an assessment, and do its part toward determining the balance due it. This agreement relates only to the adjustment of the accounts between the parties. If the city should neglect and refuse to do its part, after a demand or request by the plaintiffs, it might well be that the plaintiffs would not be obliged to delay longer the collection of their damages. In *Aspinwall* v. *Boston*, 191 Mass. 441, 447, it is said that, "The important practical question is whether the stipulation as to the delay in collecting damages can be enforced against the plaintiffs, when the city fails to perform that part of the contract which calls for the immediate construction of the street." At page 445, "If the construction had been finished seasonably, in pursuance of the provisions of the writing, there would have been a complete acceptance by performance, which would have bound the city, as well as the plaintiffs, provided the contract is such as the representatives of the city had a right to make." The opinion also recognizes the fact that, to do its whole duty under the writing, the city must be ready to offset the land damages against the betterments, and determine the balance which it was assumed would then be due from the plaintiffs. In that case the court had no occasion to consider the question whether a failure on the part of the city to assess betterments promptly after the completion of the work, when there was no request or suggestion by the landowners that an adjustment was desired, would be a breach of the contract, such as would

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entitle the landowners to sue at once for the whole amount of their damages. It would seem that every day's delay in the assessment of betterments was an advantage to the landowners, for it postponed the necessity of paying to the city the excess of the betterments above the land damages.

We are of opinion that this setting off of one claim against the other and determining of the balance was to be done by the parties jointly, the plaintiffs participating in it, as well as the city. It was as much the duty of the plaintiffs as of the defendant to go forward and ascertain the balance. It follows that, until there was a neglect or failure of the city to do its part within a reasonable time upon a request by the plaintiffs, the city was not in default, and the plaintiffs were not relieved from their obligation to set off the damages against the betterments. There is little doubt that an assessment would have been made without much delay if the plaintiffs had asked for an accounting and a determination of the balance. See *Averill* v. *Boston*, 193 Mass. 488.

It is therefore unnecessary to consider how far the delay was justified by the litigation in other cases and the changes in the statutes, which have been referred to by the defendant as explaining its failure to make the assessment promptly.

The fact that the assessment was made under a statute enacted after the work was completed is immaterial. The writing binds the parties in reference to any assessment lawfully made to meet the expenses of the laying out and construction. Such an assessment may be made under a statute passed after the work is done. *Hall* v. *Street Commissioners*, 177 Mass. 434. *Warren* v. *Street Commissioners*, 187 Mass. 290. See *Tappan* v. *Street Commissioners*, 193 Mass. 498.

Judgment on the finding.

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MARGARET M. GILLIGAN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 11, 1907. — March 1, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence. Street Railway.

If on a summer afternoon a woman while walking in a leisurely manner over the cross walk of a city street, with which she is familiar, at the corner of an intersecting street where in the centre of the street there is a frog of a street railway track projecting one, two or possibly three inches above the flagging of the cross walk, there being no car to cause her to hurry and nothing to disturb her or distract her attention, notices the projection of the frog, and, instead of stepping over it, strikes her foot against it with such force as to throw her down, she is not in the exercise of due care and cannot maintain an action against the railway company maintaining the track for injuries thus caused, even if there is evidence of negligence on the part of such company in maintaining the frog at an unnecessary height above the pavement of the street.

TORT for personal injuries from being thrown down by a projection of a portion of the track of the defendant as the plaintiff was travelling on a cross walk on P Street at the corner of Fourth Street in that part of Boston called South Boston on August 10, 1902. Writ dated November 25, 1902.

In the Superior Court the case was tried before *Schofield*, J., who ordered a verdict for the defendant. The plaintiff alleged exceptions.

P. B. Kiernan, for the plaintiff.

S. H. E. Freund, (E. P. Saltonstall with him.) for the defendant.

KNOWLTON, C. J. The plaintiff was crossing Fourth Street in South Boston, at a point where the track of the defendant runs around a curve into P Street, which crosses Fourth Street at right angles, and struck her foot against a frog in the track with such force as to throw her down and cause an injury. Her contention is that the defendant was negligent in maintaining the frog there as a part of the track.

Most of the evidence was uncontradicted. There were numerous witnesses who testified that this was a necessary and

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proper mode of construction where a railway track passes around a curve so as to make a right angle in its course through two connecting streets, that this frog was about two feet long, and corrugated on top, that there was a grooved rail going around the curve, with a guard on the outer side of the rail, forming a part of the groove to keep the wheel from running off the track, and that the top of the guard was three eighths of an inch higher than the top of the rail on the inside. There was, however, uncontradicted evidence that it was necessary that the rail and the frog should be higher than the paving of the street. The only witness who made a measurement testified that the distance from the top of the corrugated iron to the surface of the flagstones was one inch. One of the plaintiff's witnesses, a police officer who saw the accident, said that he should judge that the rails projected an inch and a half or two inches above the flagging. It was undisputed that there had been no change in the condition of the flagging and track since the accident, and photographs and a plan of the location were put in evidence. A female witness who was with the plaintiff when she fell testified that the frog projected about three inches from the flagging; that she had not measured it, but had seen it measured by a person who was not present as a witness. She found it difficult to point out, on the plan or photograph, the place where the measurement had been made. Except as above, there was no evidence that the frog was of unusual height above the paving, and there was much testimony, some of it from witnesses called by the plaintiff, tending to show that the frog and the flagstones about it were in perfect condition. Some of the testimony as to the proper mode of construction of a track in such a place was of facts of common knowledge, of which the court might take judicial notice.

It is difficult to say that there was any evidence of negligence on the part of the defendant. The place was in the middle of a street, where the surface cannot be expected to be so free from irregularities as a sidewalk which is to be used exclusively by travellers on foot.

In view of the testimony of two of the plaintiff's witnesses as to the height of the frog, and the evidence bearing on the question whether the plaintiff was in the exercise of due care, we do

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not decide whether the plaintiff might have gone to the jury on this part of her case if her evidence had been sufficient in other particulars.

The place was not far from the plaintiff's home, on an important street with which, presumably, she was familiar. The accident happened at about half past four o'clock on a summer day. She testified "that she was going leisurely before she fell." There was no car that caused her any hurry, and there was nothing to disturb her or distract her attention. She testified that she noticed where she placed her feet as she was approaching, and, in reply to this question of her counsel, "Did you notice this projection here of this frog, as you call it, before you tripped against it?" she answered, "Yes." We are of opinion that, as she was walking under such conditions and noticing the projection of the frog, there was no evidence on which the jury could find that she was in the exercise of due care in striking her foot against the frog in such a way as to throw her down. She not only knew that she was walking across the travelled part of the street, used by ordinary teams and occupied by a railway track, but she then noticed the particular obstruction of which she complains, and instead of stepping over it, she carelessly struck her foot against it, seemingly with a great deal of force. There was no evidence that she was in the exercise of due care. *Ware* v. *Evangelical Baptist Society*, 181 Mass. 285. *Falkins* v. *Boston Elevated Railway*, 188 Mass. 153. *Willworth* v. *Boston Elevated Railway*, 188 Mass. 220. *Hilborn* v. *Boston & Northern Street Railway*, 191 Mass. 14.

Exceptions overruled.

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SAMUEL H. HELLEN *vs.* CITY OF BOSTON.

Suffolk. January 14, 1907. — March 1, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Assignment. Municipal Corporations.

It is no notice of an assignment of a claim against a city for work done and materials furnished, for which an action was pending when the assignment was made in which the assignor afterwards obtained a judgment against the city, that the assignee left the assignment at the office of the city clerk to be recorded as an assignment of future earnings under R. L. c. 189, § 34, and asked a subordinate in the office of the city clerk "to get the notice to the city treasurer," that the subordinate sent to the city treasurer a card with a notice of the assignment in the manner used for notices of assignments of wages, and that the card was received in the office of the city treasurer by the subordinate accustomed to receive notices of assignments of wages; and, after the doing of these things, a payment of the amount of the judgment to the assignor made by the city in good faith releases the city from all obligation to the assignee.

CONTRACT by Samuel H. Hellen, claiming under an assignment from James L. Bryne and Company, for an amount due to the plaintiff's assignors for materials furnished and labor performed under a contract with the defendant for which they recovered a judgment against the defendant after the making of the assignment to the plaintiff, it being alleged that due notice of the assignment was given to the defendant and that it was recorded with the records of assignments of wages. Writ in the Municipal Court of the City of Boston dated January 31, 1906.

On appeal to the Superior Court the case was tried before *Pierce*, J., without a jury. The judge refused to rule that the plaintiff, as a matter of law, was entitled to a finding in his favor, and ruled that no sufficient notice of the assignment had been given by the plaintiff to the city. He found and ordered judgment for the defendant; and the plaintiff alleged exceptions.

S. H. Tyng, for the plaintiff.

P. Nichols, for the defendant.

KNOWLTON, C. J. James L. Bryne and Company had a contract with the defendant to perform certain work, and, a dispute arising as to the amount due, an action was brought by the contractor in November, 1900. Trial was had on June 15, 1904,

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and resulted in a finding for J. L. Bryne and Company for part of the disputed account. They moved for a new trial, but subsequently withdrew their motion, took out execution and collected the judgment. Meanwhile J. L. Bryne and Company, without the knowledge of their attorneys, or of any of the defendant's attorneys or officials, had, on January 6, 1904, assigned the claim to the plaintiff in this case. This plaintiff concealed the assignment during the trial, at which he was present, and never notified any of the counsel in the case, but, on July 6, 1904, attempted to record his assignment as an assignment of wages or future earnings, under the R. L. c. 189, § 34. The property assigned was described as follows: "The following described account, viz: all monies due us on suit now pending in Superior Court, Suffolk Co., and all and whatever sum or sums of money now due and coming due to us from the City of Boston in the Commonwealth of Massachusetts."

The city having paid the judgment in good faith, the plaintiff brought this action, and the only question is whether what occurred when he left the assignment for record constituted notice to the city of the plaintiff's claim.

The plaintiff handed his assignment to a subordinate clerk in that part of the office of the city clerk in which assignments of wages are recorded, together with the usual fee. Thereupon the subordinate stamped on the back of the assignment, this, "Office of City Clerk. Rec'd July 6, 1904, 2 & 28 P. M., Boston, Mass." The city clerk also made the following certificate at the bottom thereof, "City of Boston. July 6, 1904. 2 & 28 Min. P. M. Received and entered with the records of the Assignments of Wages Vol. 82, page 221. Edward J. Donovan, City Clerk."

It is plain that this was not notice to the city of the assignment of the claim on which the Superior Court had made a finding. The only authority of the subordinate clerk, or of the city clerk, in regard to matters of this kind, was to record assignments of future earnings. The subordinate clerk was approached and requested to act officially merely as a recording officer. It was not his duty to receive notices in behalf of the city that should affect the city's financial action or its liability. The city clerk himself, presumably, knew nothing of the matter except

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that what appeared to be an assignment of wages had been received and recorded in the usual way.

The plaintiff testified that when the subordinate took the assignment for record he asked him "to get the notice to the city treasurer," and the subordinate said he would notify him; that, being asked in what way he did it, he replied, "I notify through that chute," and said "I will see that he has notice inside of two minutes"; that thereupon, following the custom in the office of sending notice to the city treasurer of the recording of assignments of wages when the wages were due from the city, the subordinate filled out a card as follows:

"Notice of Assignment.

Assignor.	James L. Bryne & Co.
Date of record.	July 6,—04.
Assignee.	Samuel H. Hellen.
Expires.	
Department.	
Remarks.	Suit now pending in Superior Court, Suffolk Co.

"J. W. C.
for City Clerk."

This card was duly received in the office of the city treasurer by the subordinate who was accustomed to receive notices of assignments of wages. It was not contended by this plaintiff that the subordinate had any authority to bind either the city clerk or the city treasurer, but only that he volunteered to act in behalf of the plaintiff, in transmitting the card to the office of the city treasurer. Execution was taken out soon afterwards in the original action, and was presented to the city treasurer, who paid it to the attorney of the plaintiffs in that action, and satisfaction was indorsed thereon. The money was paid over to Bryne, one of the plaintiffs in that action.

The question, therefore, is whether the card, transmitted in this way, was notice to the city of the plaintiff's ownership of the claim in question. This card purported to relate only to the assignment of future earnings. It was received, in the usual way, from the clerk in the city clerk's office who had in charge the recording of such assignments, and it came to a subordinate clerk in the city treasurer's office who had such matters in

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charge there. There was nothing about it to put any one on inquiry as to any matter except the matter of future earnings from the city. So far as appears, this claim was not of a kind that called for such a record, and the card would not direct the subordinate who received it, or any one who should observe it, to such a claim. We are of opinion that the judge was right in ruling that the plaintiff failed to bring home to the city knowledge of his title, such as to require it to refuse to pay the execution to the attorney of Bryne and Company, who obtained the judgment.

Exceptions overruled.

SAMUEL B. HOPKINS & another, executors, *vs.* AMERICAN PNEUMATIC SERVICE COMPANY.

Suffolk. January 14, 1907. — March 1, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence. Damages. Evidence. Witness, Cross-examination.

In an action by the owner of a building against the owner of the adjoining land for negligence in digging a trench on his own land so near the party wall that the plaintiff's building settled, whereby it was damaged and its rental value diminished, the measure of damages is the difference between the fair market value of the plaintiff's property before the injury caused by the defendant and its market value after such injury, and the cost of restoring the property to its former condition is not necessarily the criterion for determining the damage.

In an action by the owner of a building against the owner of the adjoining land for negligence in digging a trench on his own land so near the party wall that the plaintiff's building settled, whereby it was damaged and its rental value diminished, the plaintiff testified that his tenant left him by reason of the injuries caused by the defendant. On the plaintiff's cross-examination the defendant was allowed to show, subject to the plaintiff's exception, that the plaintiff had demanded a large sum for damages to his property on account of the diminution of its rental value by the construction of an elevated railway in the street in front of the premises, that he made a claim against the corporation operating the elevated railway and got damages "for light, air and noise," receiving $5,100 for injury to this property and the adjoining one. *Held*, that this testimony was in the nature of an admission by the plaintiff that the rental value of his property was greatly diminished from causes other than the wrongful acts of the defendant, and that this fact prop-

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erly might affect the weight of his direct testimony in which he imputed the loss of his tenant to the undesirability of his property for occupation caused by the digging of the trench; consequently that the judge in his discretion well might admit the testimony in cross-examination.

TORT, originally by Rebecca M. Hopkins, for damages to her land and building numbered 1508 on Washington Street in Boston from the negligent digging by the defendant of a trench on its adjoining land near the party wall, which caused the plaintiff's building to settle, whereby it was alleged that the building was damaged and depreciated in value, that the plaintiff lost tenants and that the rental value of the building was diminished permanently. Writ dated November 16, 1901.

On November 11, 1902, Rebecca M. Hopkins died and Samuel B. Hopkins and Addie L. Meins were appointed executors of her will. On the suggestion of her death they were admitted as parties to prosecute the action.

At the trial in the Superior Court before *Sherman*, J. the jury returned a verdict for the plaintiffs, and assessed damages in the sum of $367. The plaintiffs alleged exceptions to an instruction of the judge as to the measure of damages and to the admission by him of certain testimony on the cross-examination of Samuel B. Hopkins, one of the plaintiffs. The questions raised by the exceptions are stated in the opinion.

F. D. Allen & L. K. Clark, for the plaintiffs.

S. J. Elder, (*J. T. Pugh* with him,) for the defendant.

KNOWLTON, C. J. This is an action of tort to recover damages to the plaintiffs' building, caused by the defendant in negligently and improperly digging a trench in the cellar of its adjacent house, near the party wall. There are two exceptions for our consideration, one to the instructions of the judge on the question of damages, the other to the admission of testimony.

The jury were instructed that, if they came to the question of damages, the plaintiffs were entitled to recover the difference between the fair market value of the property before the injury caused by the defendant and its market value after the injury. This is the correct rule in cases of this kind. *Childs* v. *O'Leary*, 174 Mass. 111, 114–116. *Adams* v. *Marshall*, 138 Mass. 228, 239. *Gilmore* v. *Driscoll*, 122 Mass. 199, 209. The cost of restoration of the property to its former condition does

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not necessarily furnish a true criterion for determining damages. Sometimes to make such a restoration would be an uneconomical and improper way of using the property. It might involve a very large and disproportionate expense to relieve from the consequences of a slight injury. In many cases the cost of repairs would be an accurate measure of the damages. To incur the cost is often the best way of dealing with the property. In the present case evidence was introduced of what this cost would be, and the jury were permitted to consider it in determining the diminution of the market value.

The fact that the source of the injury was the settling of a party wall does not affect the rule of damages in this case. The plaintiffs sought to recover for resulting defects in different parts of the building. There was no error in the instructions.

The original plaintiff, in her declaration, averred that her building was rendered "unsafe for use and habitation; whereby the tenants of the plaintiff were compelled to vacate the said building and the plaintiff was for a long time unable to rent or lease the same by reason of damaged condition thereof, . . . and by reason of the reduced value of the plaintiff's said building the plaintiff is unable to obtain as high a rental for the said building as formerly," etc. One of the plaintiffs testified that his tenant went out by reason of the injuries caused by the defendant. The defendant, in cross-examination of this witness, undertook to meet this assertion by showing that the plaintiffs had demanded a large sum for damages to the property on account of the diminution of its rental value by the construction of the elevated railway through the street in front of the premises. To the questions on this subject the witness answered with some reluctance, admitting that he made a claim against the elevated railway company, which was settled, but denying that he made any claim that tenants left him, or that the premises were not rentable on account of noise. He said that he got damage "for light, air and noise." He was then asked how much he got, and answered, subject to the exception of his counsel, $5,100 for the two houses, equally divided between the two.

The evidence was properly admitted. The making of such a claim for "light, air and noise," all of which would affect the

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rental value of his property, was in the nature of an admission that the rental value was very greatly diminished from causes other than the wrong of the present defendant, and this fact properly might affect the weight of his testimony, in which he imputed the loss of his tenant to the undesirability of his property for occupation by tenants on account of the injuries caused by the digging of the trench. At least in cross-examination, the testimony well might be admitted, in the discretion of the court.

Exceptions overruled.

MICHAEL J. TERNAN *vs.* MARY A. DUNN.

Suffolk. January 14, 1907. — March 1, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Mortgage, Of household furniture. *Small Loans Act.*

Under St. 1892, c. 428, § 3, (R. L. c. 102, § 53,) providing that "no mortgage of household furniture on which interest is charged at the rate of eighteen per centum or more per annum, made to secure a loan of less than one thousand dollars, shall be valid unless it state with substantial accuracy the amount of the loan, the time for which the loan is made, the rate of interest to be paid, and the actual expense of making and securing the loan," in case a mortgage of the kind described by the statute is made without any expense of making and securing the loan this fact must be stated in the mortgage, and an instrument purporting to be such a mortgage which contains no statement on the subject is void.

TORT for the alleged conversion of certain articles of household furniture belonging to the plaintiff which the defendant claimed under an instrument purporting to be a mortgage assigned to her by one Penina H. Shorey. Writ in the Municipal Court of the City of Boston dated January 27, 1903.

On appeal to the Superior Court the case was tried before *Flaherty*, J. The alleged mortgage was made under St. 1892, c. 428, § 3, and was assigned to the defendant on May 23, 1899. It was recorded on June 10, 1897, with the records of mortgages of personal property in the clerk's office of the city of Boston where the property was situated and the assignment was recorded on May 24, 1899.

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It appeared in evidence that on May 25, 1899, the plaintiff was a tenant of the defendant, and on that day attempted to move from the premises occupied by him all of the furniture mentioned in the alleged mortgage, and that he forcibly was prevented by the defendant from doing so; and that the defendant claimed the property under the mortgage. She did not at that time nor afterwards attempt to foreclose the mortgage.

The plaintiff admitted that he never had questioned the validity of the mortgage up to nor at the time he attempted to remove the goods from the premises, and that he was willing that the defendant should be secured by the mortgage until it was paid. The note given to secure the alleged mortgage was made on June 7, 1897, was due August 7, 1897, was assigned to the defendant on May 23, 1899, nothing was paid thereon, and no extension of the time of payment ever was made.

It further appeared in evidence that the plaintiff made a demand upon the defendant for the mortgaged property about April, 1901, and that the defendant then demanded payment of the mortgage and interest, rent and costs of suit before the plaintiff could have his furniture.

The defendant then offered evidence tending to show that the plaintiff, of his own will, left the mortgaged goods on her premises for security for her alleged mortgage and that she did not prevent him from taking the property out of her premises; that in April, 1901, she did not refuse to deliver the property to him and she made no demand upon the plaintiff then or at any other time; that before he could have the mortgaged goods he must pay the mortgage and interest; that the plaintiff never made any assertion to her that the mortgage was invalid; and that the plaintiff agreed to pay the mortgage by instalments.

The defendant offered the mortgage in evidence and the assignment thereof to herself and both were admitted. The mortgage stated the amount of the loan to be $199.50, the time for which the loan was made to be two months from the date of the mortgage, which was June 7, 1897, and the rate of interest to be two per cent a month, but contained no statement in regard to the expenses of making and securing the loan.

The defendant offered the evidence of one Schofield tending to prove that the loan on the mortgage was made to take up a

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prior mortgage upon the same property. The defendant further offered to prove by Schofield that there was no actual expense of making and securing the loan under the mortgage assigned to the defendant, and that the plaintiff was charged nothing therefor, and the defendant still further offered to prove by Schofield that besides there being no actual expense of making and securing the loan under the mortgage an actual discount was made to the plaintiff from the principal and interest of the prior mortgage, thereby tending to contradict the evidence of the plaintiff that a charge of three dollars and some odd cents was made for making and securing the loan. To these offers of evidence the plaintiff objected and the evidence was excluded by the judge, subject to the defendant's exception.

The defendant asked the judge to instruct the jury as follows: That if there was no actual expense of making and securing the loan mentioned in the mortgage of the plaintiff's furniture which is held by the defendant then the mortgage is a valid and legal mortgage and the plaintiff had no right to remove the goods mentioned in the mortgage from the tenement of the defendant and there is no conversion of the mortgaged goods, and the verdict should be for the defendant.

The judge refused to give this instruction, and instructed the jury that "said mortgage is of no material consequence except as bearing upon the question whether the plaintiff abandoned that furniture, left it in the tenement, thinking that because of that mortgage he had no right to remove it; that as a matter of law the mortgage was invalid, of no effect, and that the defendant acquired no right under it; and that the defendant did not have, as a matter of fact, a right to retain the property under said mortgage."

The jury returned a verdict for the plaintiff in the sum of $766.50; and the defendant alleged exceptions, which after the death of *Flaherty*, J. were allowed by *Fessenden*, J.

The case was submitted on briefs.

C. B. Loud, for the defendant.

H. D. Campbell & C. E. Lawrence, for the plaintiff.

KNOWLTON, C. J. This is an action of tort for the conversion of certain articles of household furniture. The defendant claims title under a mortgage. The St. 1892, c. 428, § 3, (R. L.

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c. 102, § 53,) which was in force when the mortgage was made, is as follows: "No mortgage of household furniture on which interest is charged at the rate of eighteen per centum or more per annum, made to secure a loan of less than one thousand dollars, shall be valid unless it state with substantial accuracy the amount of the loan, the time for which the loan is made, the rate of interest to be paid, and the actual expense of making and securing the loan, nor unless it contain a provision that the debtor shall be notified in the manner provided in section seven of chapter one hundred and ninety-two of the Public Statutes, of the time and place of any sale to be made in foreclosure proceedings at least seven days before such sale." This mortgage is of the kind mentioned in the statute. It contains no statement of the "actual expense of making and securing the loan." The defendant offered to show that there was, in fact, no such expense. The plaintiff testified that there was such expense which was paid. The only question is whether the mortgage is valid without the statement, if in fact there was no expense.

We think the statute requires that such a mortgage shall "state with substantial accuracy" what the fact is in regard to each of the matters referred to as a subject for a statement. The statute recognizes that mortgagees, in transactions of this kind, are sometimes hard and oppressive in their dealings with mortgagors, and it was with a view to the protection of small borrowers at high rates of interest that these facts are required to be stated in the mortgage, so that they will appear of record. The benefit of the provision would be much diminished if the statement could be omitted, and the mortgage held valid upon the testimony of the mortgagee that there was no expense of making and securing the loan. It is in part to prevent the possibility of such contradiction as appeared at the trial in the present case that the written statement in the mortgage is required. If there was no expense, the mortgage should have contained a statement to that effect.

Exceptions overruled.

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JOHN T. HICKS *vs.* GEORGE A. GRAVES & others.

Middlesex. January 15, 1907. — March 1, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Practice, Civil, Appeal.

An appeal to the full court from a judgment of the Superior Court under R. L. c. 173, § 96, brings before this court only matters of law apparent on the record.

On an appeal to the full court from a judgment of the Superior Court under R. L. c. 173, § 96, the stenographer's report of the evidence in the Superior Court is not a part of the record of that court and is not brought before this court by the appeal.

KNOWLTON, C. J. This action for a conspiracy comes to this court on an appeal from a judgment for the defendants in the Superior Court. Our only jurisdiction to deal with the case is that given by R. L. c. 173, § 96, which opens for revision only matters of law apparent on the record. The plaintiff seems to have a mistaken opinion that we have power to consider the merits of his case on matters of fact.

A careful reading of all the several voluminous papers that have been brought before us discloses no matter of law within our jurisdiction. Exceptions were taken at one stage of the case, but the bill which was presented to the court was disallowed. If the plaintiff was aggrieved by the action of the Superior Court on this bill of exceptions, his only remedy was by filing a petition to this court to establish his exceptions. R. L. c. 173, § 110. No such petition has been filed. If the later action of the plaintiff in regard to the order denying a motion for a new trial can be treated as an exception, the only way in which the plaintiff could avail himself of it was by filing a bill of exceptions. R. L. c. 173, § 106. This he failed to do.

The stenographer's report of the evidence is not a part of the record, and it cannot be considered as presenting questions of law on an appeal of this kind. The record shows no error of law in the disposition of the case.

If there was in the case any important question of law, the decision of which by the Superior Court was fairly questionable,

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which we do not intimate, the plaintiff has failed to take the measures prescribed by the statutes for bringing it before us for revision. Our action must be limited by our jurisdiction created by the statutes.

Judgment affirmed.

J. T. Hicks, pro se.

H. Albers, (*T. W. Proctor & J. W. Keith* with him,) for the defendants.

WESTINGHOUSE ELECTRIC AND MANUFACTURING COMPANY *vs.* T. I. REED & others.

Suffolk. January 15, 16, 1907. — March 1, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Street Railway. Corporation, Liability of directors. *Equity Jurisdiction. Equity Pleading and Practice.*

The liability of the directors of a street railway company under R. L. c. 112, § 19, now St. 1906, c. 463, Part III. § 29, to the extent of its capital stock, for all its debts and contracts until the whole amount of its capital stock has been paid in and a certificate stating the amount fixed and paid in has been filed, can be enforced only in equity.

In a suit in equity to enforce the liability of the directors of a street railway company under R. L. c. 112, § 19, now St. 1906, c. 463, Part III. § 29, to the extent of its capital stock, for all its debts and contracts until the whole amount of its capital stock has been paid in and a certificate stating the amount fixed and paid in has been filed, it is not necessary to make the corporation a party.

The provision of St. 1903, c. 437, § 36, that a stockholder or officer in a corporation shall not be held liable for its debts or contracts unless it has been adjudicated bankrupt or a judgment has been recovered against it which it has neglected to pay, has no application to a suit in equity to enforce the liability of the directors of a street railway company under R. L. c. 112, § 19, now St. 1906, c. 463, Part III. § 29, to the extent of its capital stock, for all its debts and contracts until the whole amount of its capital stock has been paid in and a certificate stating the amount fixed and paid in has been filed.

Creditors of a street railway company before bringing a suit in equity to enforce the liability of the directors of the company under R. L. c. 112, § 19, now St. 1906, c. 463, Part III. § 29, to the extent of its capital stock, for all its debts and contracts until the whole of its capital stock has been paid in and a certificate stating the amount fixed and paid in has been filed, need not exhaust their remedy against the corporation by taking out execution or otherwise.

Under R. L. c. 112, § 19, now St. 1906, c. 463, Part III. § 29, making the directors of a street railway company jointly and severally liable, to the extent of its

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capital stock, for all its debts and contracts until the whole amount of its capital stock shall have been paid in, and a certificate stating the amount thereof fixed and paid in shall have been signed and sworn to by its president, treasurer, clerk and a majority of the directors, and filed in the office of the secretary of the Commonwealth, if the whole amount of the capital stock never has been paid in, the filing of a certificate by the directors and officers named in the statute falsely stating that the whole amount of the capital stock has been paid in does not stop the liability of the directors under the statute, and it is immaterial whether or not the directors acted in good faith in making the certificate.

In a bill in equity to enforce the liability of the directors of a street railway company under R. L. c. 112, § 19, now St. 1906, c. 463, Part III. § 29, to the extent of its capital stock, for all its debts and contracts until the whole amount of its capital stock has been paid in and a certificate stating the amount fixed and paid in has been filed, an averment, that the whole amount of the capital stock "was never actually paid in in cash" and "that no valid certificate has been filed by the directors of said street railway company to the effect that said capital stock has been paid in as required" by the statute, is not bad on demurrer in failing to state that no certificate has been filed, because the filing of a false certificate would not end the defendant's liability.

BILL IN EQUITY, filed in the Superior Court on March 30, 1906, under R. L. c. 112, §§ 18, 19, by the Westinghouse Electric and Manufacturing Company, a corporation organized under the laws of the State of Pennsylvania and having a usual place of business in Boston, for the benefit of itself and of any creditors of the Lowell and Boston Street Railway who might desire to join with it, against T. I. Reed of Burlington, Frank E. Cotton and F. A. Partridge of Woburn and Richard Faulkner of Billerica, as directors of that railway company, alleging that the plaintiff in December, 1901, and March, 1902, contracted to deliver and in April, 1902, did deliver to the Lowell and Boston Street Railway Company certain electrical equipment for use upon its railway; that on March 26, 1906, the plaintiff obtained a judgment against said railway company founded upon that contract and debt in the amount of $578.17 damages and $30.37 costs; that on or about March 1, 1904, John T. Burnett, John L. Hall and George H. Newhall were by order of the Circuit Court of the United States for the District of Massachusetts appointed receivers of the Lowell and Boston Street Railway Company; that there were no assets to distribute among the creditors of the railway company; that the receivers have been discharged and that the railway company has not since had any assets whatever; that the Lowell and Boston Street Railway Company is a street railway corporation which, at the date at which the

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contract was made and the debt was incurred, and for some time thereafter, owned and operated a street railway between the town of Billerica and the city of Woburn; that the defendants were at the date at which the debt was incurred, and for a long time before and since have been, directors of the Lowell and Boston Street Railway Company; that the amount of capital stock of said street railway company, as fixed by its agreement of association, was $90,000; that the whole amount of the capital stock, as so originally fixed, was never actually paid in in cash as required by the provisions of R. L. c. 112, §§ 18, 19; and that no valid certificate has been filed by the directors of said street railway company to the effect that said capital stock has been paid in as required by said statutes; praying for process to attach the real estate of the defendants, for a decree requiring the defendants jointly and severally to satisfy the debt owed the plaintiff by the said street railway company with interest, and for further relief.

The defendants demurred to the bill and as causes of demurrer assigned the following:

First. Because the plaintiff has not stated in its bill such a cause of action as entitles it to any relief in equity against the defendants or any of them.

Second. Because the plaintiff has a full, complete and adequate remedy at law.

Third. Because it is not alleged in the bill, and nowhere appears therein, that the Lowell and Boston Street Railway Company has ever been duly adjudicated bankrupt, nor that a judgment has been recovered against it, and that it has neglected for thirty days after demand made on execution, to pay the amount due, with the officer's fees, or to exhibit to the officer real or personal property belonging to it and subject to be taken on execution sufficient to satisfy the same, or that any execution has been issued upon any judgment in favor of the plaintiff and returned unsatisfied.

Fourth. Because the bill does not set forth in detail such allegations as are necessary to enable the plaintiff to maintain its bill.

Fifth. Because, while it appears by the bill that the plaintiff relies upon the provisions of R. L. c. 112, § 18, as to the payment

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in of capital stock, it is not alleged in the bill that any certificate of capital stock in said railway company has ever been issued.

Sixth. Because the validity or invalidity or the truth or falsity of the certificate filed by the directors of said railway company to the effect that said capital stock had been paid in as required by the statutes referred to in the bill cannot be tested in this proceeding.

In the Superior Court the case came on to be heard upon the bill and demurrer by *Fessenden*, J., who reported it for determination by this court. If the demurrer was sustained, the bill was to be dismissed; if the demurrer was overruled, the defendants were to answer.

F. H. Nash, for the plaintiff.

A. H. Russell, for the defendants.

SHELDON, J. It was provided by R. L. c. 112, § 19, in force when this bill was brought, that "the directors of a street railway company shall be jointly and severally liable, to the extent of its capital stock, for all its debts and contracts until the whole amount of its capital stock as originally fixed by its agreement of association, or if a chartered company, by its directors, shall have been paid in, and a certificate stating the amount thereof so fixed and paid in shall have been signed and sworn to by its president, treasurer, clerk and a majority of its directors, and filed in the office of the secretary of the Commonwealth." These provisions are now contained in St. 1906, c. 463, Part III. § 29. The bill is brought under that statute to enforce the liability of the directors of the Lowell and Boston Street Railway Company, for debts alleged to have been incurred by that company.

It seems manifest to us that the remedy to enforce this liability must be in equity and not at law. The liability of the defendants is not for all the debts and contracts of the company, but only for those debts and contracts to the extent of its capital stock. The liability, being to this limited extent for all the debts and contracts of the company, is not to be enforced for the benefit of the creditor who may first seek to avail himself thereof, which might result in excluding other creditors by exhausting the fund, but must be made available for the benefit of all the creditors. *Harris* v. *First Parish in Dorchester*, 23

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Pick. 112. *Crease* v. *Babcock*, 10 Met. 525. *Bell* v. *Spaulding*, 3 Allen, 485. For the reasons stated in those opinions, it is only in equity that the rights of all parties can be protected and an adequate remedy given. See to the same effect *Knowlton* v. *Ackley*, 8 Cush. 93, 97; *Kinsley* v. *Rice*, 10 Gray, 325; *Merchants' Bank* v. *Stevenson*, 10 Gray, 232; *Merchants' Bank* v. *Stevenson*, 5 Allen, 398, 400; *Commonwealth* v. *Cochituate Bank*, 3 Allen, 42, 44; *Pope* v. *Leonard*, 115 Mass. 286, 290.

The corporation is not a necessary party to the bill. This statute creates a different liability from that imposed by R. L. c. 110, §§ 58 *et seq.* By § 62 of that statute the corporation is made a necessary party to a bill brought to enforce that liability. It is only for this reason that the corporation must be joined as a defendant. *Barre National Bank* v. *Hingham Manuf. Co.* 127 Mass. 563, 567, 568. As was pointed out in that case, the right to proceed against the directors never belonged to the corporation and was no part of its assets. So in *Clarke* v. *Warwick Cycle Manuf. Co.* 174 Mass. 434, 437; *Hancock National Bank* v. *Ellis*, 166 Mass. 414, 419; *Chamberlin* v. *Huguenot Manuf. Co.* 118 Mass. 532; *New Lamp Chimney Co.* v. *Ansonia Brass & Copper Co.* 91 U. S. 656, 666. The provisions of St. 1903, c. 437, § 36, do not apply to this case for the same reasons, and for the further reason that by § 1 of that act street railway companies are excluded from its provisions. Nor need the creditors exhaust their remedy against the corporation by taking out execution or otherwise, because the statute under which this bill is brought requires no such action.

The statute provides that the liability of the directors shall continue until the whole amount of the capital stock shall have been paid in and a certificate thereof shall have been signed and sworn to by the president, treasurer, clerk and a majority of the directors, and filed in the office of the secretary of the Commonwealth. R. L. c. 112, § 19. St. 1906, c. 463, Part III. § 29. The bill avers that the whole amount of the capital stock "was never actually paid in in cash," and "that no valid certificate has been filed by the directors of said street railway company to the effect that said capital stock has been paid in as required" by the statute. The defendant contends that this is not an averment that no certificate has been filed, and that the validity

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of the certificate is not to be inquired into in this proceeding, but that the statutory liability of the defendants ends as soon as a certificate shall have been filed, whether its statements are true or untrue. *Stedman* v. *Eveleth*, 6 Met. 114, 120, 121. The liability considered in that case rested upon the stockholders until the capital stock should have been paid in and the officers of the corporation should have filed a certificate thereof; and it was held that the liability of the stockholders for subsequent debts of the corporation ceased upon the filing of the certificate. But the reasoning of the court in that case is inapplicable to the facts in the case at bar. Here the liability is upon the directors; and it is upon them, acting by a majority of that body, as well as upon other officers, that the duty of signing, swearing to and filing the required certificate rests. It would be strange if by their mere false statement under oath, whether made wilfully or carelessly, they could terminate the liability imposed upon them, especially as it ordinarily would be in their own power to prevent the incurring of the debts and the making of the contracts which create that liability. Nor is it material whether the directors did or did not act in good faith in making the certificate. It concerned a matter as to which they had full means of knowledge. We cannot restrict their liability further than is done by the statute. *Anthony & Scovill Co.* v. *Metropolitan Art Co.* 190 Mass. 35.

The formal objection that the bill avers that the capital stock has not been paid in "in cash," and that no valid certificate has been filed "by the directors," whereas the requirement of the statute is that it be filed by the president, treasurer, clerk and a majority of the directors, has not been argued and need not be considered. Nor has it been argued that the bill should have averred that any certificate of capital stock had been issued, or that the proper defendants are not those who were the directors when the debt due to the plaintiff was incurred. See *Holyoke Bank* v. *Burnham*, 11 Cush. 188; *Johnson* v. *Somerville Dyeing & Bleaching Co.* 15 Gray, 216.

Demurrer overruled.

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AMERICAN STEEL AND WIRE COMPANY *vs.* AUGUSTUS M. BEARSE & others.

Suffolk. January 15, 16, 1907. — March 1, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Jurisdiction. Equity Jurisdiction. Receiver. Evidence, Judicial notice.

In a suit in equity brought by a judgment creditor of a street railway company under R. L. c. 112, § 19, to enforce the liability of the directors of the company, to the extent of its capital stock, for its debts and contracts until the whole amount of its capital stock has been paid in and a certificate stating the amount fixed and paid in has been filed, where the railway company is insolvent, and the company itself and receivers of its property appointed by the Circuit Court of the United States are made defendants, and the receivers appear and file an answer submitting themselves to the jurisdiction of the court, the court of the Commonwealth in which the suit was brought has jurisdiction of it although it does not appear that the suit was authorized by the court which appointed the receivers, the corporation not being a necessary party to the suit, and the liability of the directors sought to be enforced being no property or right of the corporation to which the receivers would be entitled.

This court takes judicial notice of special acts of incorporation, which R. L. c. 175, § 72, requires shall be held to be public acts.

BILL IN EQUITY, filed in the Superior Court on June 5, 1905, and amended on March 26, 1906, under R. L. c. 112, §§ 18, 19, by the American Steel and Wire Company, a corporation organized under the laws of the State of New Jersey and having a usual place of business in Boston, for the benefit of itself and of any creditors of the Middleborough, Wareham and Buzzard's Bay Street Railway Company who might desire to join with it, against Augustus M. Bearse, Edwin F. Witham, Nathan Washburn, Charles S. Gleason and Benjamin F. Bourne as directors of said railway company, and the said railway company itself, and also against John T. Burnett and John L. Hall, receivers of the property of the said railway company, alleging that the plaintiff on November 17, 1903, obtained a judgment in the Superior Court for the county of Suffolk against the defendant railway company in the sum of $8,095.04 damages and $23.36 costs, which judgment has ever since remained unsatisfied; that the said judgment was rendered upon a debt due from the defendant railway com-

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pany to the plaintiff for materials furnished by it and used in the equipment and operation of the defendant railway company's street railway; that the defendant railway company at the date of said judgment and for some time thereafter owned and operated a street railway between the town of Middleborough and the town of Bourne; that said railway company after due and proper notice failed and neglected to satisfy said judgment; that the defendants Bearse, Witham, Washburn, Gleason and Bourne were at the date of the rendering of said judgment and for a long time before and since have been the directors of said street railway corporation; that the amount of the capital stock of said railway company as fixed by its agreement of association was $75,000; that the whole amount of said capital stock as so originally fixed has never been paid in in cash as required by the provisions of R. L. c. 112, §§ 18, 19; that, although a certificate has been filed by the directors of said street railway company to the effect that the said capital stock as originally fixed has been paid in in full in cash, said certificate is untrue and not founded in fact; that the defendant railway company at the date of the said judgment was and still is insolvent and that on March 1, 1904, the defendants Burnett and Hall were appointed by the Circuit Court of the United States receivers of the property of the defendant railway company; praying that process might issue to attach property and funds belonging to the defendant directors, and for a decree requiring them jointly and severally to satisfy the plaintiff's judgment with interest, and for further relief.

The defendant receivers appeared generally and filed an answer submitting themselves to the jurisdiction of the court.

The defendant directors demurred to the bill, and as grounds of demurrer assigned the following:

1. That it appears by the bill that the whole property and assets of the Middleborough, Wareham and Buzzard's Bay Street Railway Company, including all its right, title and interest in and to the subject matter of the bill and including all claims to all or any of the relief therein sought, is within the jurisdiction of the United States Circuit Court for the District of Massachusetts, which court appointed the defendants Burnett and Hall receivers thereof; and that such property, right, title and

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interest remains in the custody and under the care, direction and supervision and subject to the jurisdiction of said Circuit Court to be administered and distributed by it; and that this court has not jurisdiction of this suit nor jurisdiction to grant any or all the relief thereby sought.

2. That it does not appear by the bill that the plaintiff has made any application to said Circuit Court for authority to institute any suit touching the subject matter of the bill or for any or all of the relief thereby sought.

3. That it does not appear by the bill that said Circuit Court has authorized the plaintiff or any other person to institute the bill or any suit or proceedings for or on account of the subject matter of the bill or for any or all the relief thereby sought.

4. That the plaintiff has not in and by its bill stated a case which entitles it to the relief thereby sought or to any relief in a court of equity; and that the bill does not set forth with the certainty required by law or with any certainty a case entitling it to the relief thereby sought or to any relief in a court of equity.

5. That the bill fails to state with the certainty required by law or with any certainty when and under what laws said street railway company was incorporated; when and at what date the alleged debt of the petition upon which judgment was rendered, as alleged in said petition, was contracted; how many persons, and who were the directors of said street railway company at the time said debt was contracted; how many persons, and who were such directors at the time the above entitled petition was brought; how many persons, and who were such directors at the time said certificate — that the capital stock of said street railway company had been paid in in cash — was filed; or what persons signed such certificate.

6. That the bill fails to state with the certainty required by law or with any certainty that said certificate of payment was signed by the defendant directors.

7. That the bill fails to state with the certainty required by law or with any certainty that these defendants were directors of said street railway company at the time said debt, upon which said judgment was rendered, was contracted.

8. That the bill fails to state with the certainty required by

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law or with any certainty that these defendants were such directors at the time the bill was instituted.

9. That the bill does not state with the certainty required by law or with any certainty that said street railway company neglected for thirty days after judgment [and on demand] made on execution to pay the amount due on said judgment with the officers' fees, or to exhibit to the officers real or personal property belonging to it and subject to be taken on execution sufficient to satisfy the same, or that any execution has issued upon the judgment which the plaintiff alleges has been obtained, or that any demand has been made upon an execution issued on such judgment, or that any execution upon such judgment has been issued and returned to court.

10. That it appears from the allegations in the bill that a certificate, purporting to state the fixed amount of the capital stock of said street railway company and the payment thereof, has been signed and sworn to by the president, treasurer, clerk and a majority of the directors of said company and filed in the office of the secretary of the Commonwealth; and that consequently the petitioner is not entitled to relief against these defendants as therein prayed for.

11. That the bill fails to state with the certainty required by law or with any certainty when said certificate of payment was filed and by what officers and persons the same was signed and sworn to.

12. That the bill fails to state with the certainty required by law or with any certainty that the directors alleged to have signed said certificate of payment did so with knowledge that the statements therein contained were false.

13. That it appears by the bill that the plaintiff has a plain, adequate and complete remedy at law for the matters and things therein complained of.

In the Superior Court the case came on to be heard upon the bill and demurrer before *Fessenden*, J., who reported it for determination by this court. If the demurrer was sustained, the bill was to be dismissed; if the demurrer was overruled, the defendants were to answer.

F. H. Nash, for the plaintiff.

B. B. Jones, (*F. P. Cabot* with him,) for the defendants.

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SHELDON, J. It is objected by the directors of the street railway company that the bill cannot be maintained because receivers of the company have been appointed by the United States Circuit Court of this district, because the receivers are joined as defendants, and because it does not appear that this suit was authorized by that court. The receivers themselves have not raised this objection, but by their answer have submitted themselves to the jurisdiction of the court. It may be assumed, as claimed by these defendants, that the court which appoints a receiver of a corporation holds and administers the estate through the receiver as its officer, and must decide whether it will determine for itself all claims against the corporation or allow any of them to be litigated in other courts; and the control of that court over the assets of the corporation and its rights of action for any injury to or misappropriation of its property cannot be interfered with by process of any other court. *Porter* v. *Sabin*, 149 U. S. 473. *Porter* v. *Kingman*, 126 Mass. 141. But the corporation was not a necessary party to this bill; no relief is asked for against it; and the liability of its directors which it is sought to reach and enforce was never in any sense its property or a part of its assets. *Westinghouse Electric & Manuf. Co.* v. *Reed*, *ante*, 590. Nor was the failure to obtain consent of the court which appointed the receivers necessarily fatal; it might be waived by the receivers. *Tobias* v. *Tobias*, 51 Ohio St. 519. *Roxbury* v. *Central Vermont Railroad*, 60 Vt. 121. *Hackley* v. *Draper*, 4 Th. & C. 614. *Elkhart Car Works Co.* v. *Ellis*, 113 Ind. 215. *Mulcahey* v. *Strauss*, 151 Ill. 70. *Carter* v. *Rodewald*, 108 Ill. 351. *Allen* v. *Central Railroad*, 42 Iowa, 683. Here the receivers have waived the objection by submitting to the jurisdiction of the court, and the suit does not attempt to take any property or right of the corporation from the receivers, or to prevent them from reaching any such property. The demurrer cannot be sustained upon this ground.

The corporation could not have owned and operated a street railway in this Commonwealth without having been organized under its laws. As acts of incorporation are public acts, of which we must take judicial notice, R. L. c. 175, § 72, we know that it was not organized under a special charter before the

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taking effect of St. 1864, c. 229, and it could not have been organized otherwise before that time. The liability sought to be enforced in this action was created by § 6 of that act, and has since remained in force. St. 1871, c. 381, § 7. Pub. Sts. c. 113, § 14. R. L. c. 112, § 19. St. 1906, c. 463, Part III. § 29.

All the other questions argued upon this demurrer have been considered and decided in *Westinghouse Electric & Manuf. Co.* v. *Reed*, *ante*, 590.

Demurrer overruled.

PATRICK T. MAGUIRE *vs.* JOHN L. SPAULDING, JR., & others.

Suffolk. January 16, 1907. — March 1, 1907.

Present: KNOWLTON, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Equity Jurisdiction, Creditor's bill. *Mechanic's Lien. Equity Pleading and Practice*, Costs, Counsel fees.

In a suit in equity by a judgment creditor under the general equity jurisdiction of the court to have his claim satisfied out of the surplus realized from a foreclosure sale of mortgaged real estate of the debtor after satisfaction of the mortgage, in which the holders of mechanics' liens upon the real estate had intervened as claimants, it appeared that the surplus was created by the diligence of the plaintiff in attending the foreclosure sale and preventing a sale of the property for the amount of the mortgage debt, that the mechanics' liens held by the claimants were founded on contracts made before the plaintiff's attachment in the action in which his judgment was obtained but after the making of the mortgage, that under the petitions of the claimants to enforce their mechanics' liens the amounts respectively due to them had been determined, but that no decrees had been made ordering the sale of the property, because it had been sold under the mortgage. It also appeared that the total amount of the mechanics' liens exceeded the amount of the surplus. *Held*, that the holders of the mechanics' liens had not lost their rights by failing to obtain a useless order of sale, and that the plaintiff could obtain no benefit from his diligence which had created the surplus for the benefit of the holders of the liens, although the court in its discretion properly could award him costs and counsel fees out of the fund.

BILL IN EQUITY, filed in the Superior Court on January 18, 1906, by Patrick T. Maguire, a judgment creditor of Arthur Shay and John R. Murphy, copartners doing business under the name of Arthur Shay and Company, to compel John L.

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Spaulding, the junior of that name, the assignee of a mortgage upon certain real estate on Lauriat Avenue in that part of Boston called Dorchester belonging, subject to such mortgage, to Shay or Murphy, to apply to the payment of the plaintiff's judgment any surplus from the foreclosure sale of the mortgaged real estate remaining in his hands after the satisfaction of the mortgage.

A number of persons and corporations, holding the mechanics' liens referred to in the opinion, filed intervening petitions and were admitted as parties to the suit.

After the intervening petitions had been filed, there was a hearing upon them before *Fox*, J., who filed a memorandum, in which he said that if the petitioners had perfected their lien proceedings by final decree, it was clear that, under the authority of *Knowles* v. *Sullivan*, 182 Mass. 318, they would have established an interest in the surplus, and that, in his opinion, they should be permitted to intervene and be given a reasonable opportunity to perfect their liens. He said further that what the future course of proceedings should be need not then be considered, and that it might be that the lien suits should be allowed to proceed to a termination, and that then the priorities of the lienors and the attaching creditor, the plaintiff, should be determined in this suit; the fund being meanwhile under the protection of the court.

The case then was referred to Lewis G. Farmer, Esquire, as master to hear the parties and their evidence and report his findings to the Superior Court.

It appeared that the plaintiff, by his diligence in attending the foreclosure sale and preventing a sale of the property for the amount of the mortgage debt, created the surplus out of which he claimed the right to have his judgment paid. The master's report contained the following conclusion:

"The plaintiff says further that while in the ordinary case of a creditor's bill the lien attaches at the time when the bill is filed, the lien in this case dates back to November 6, [1905,] the date of the attachment. Granting this to be so, it is nevertheless true that the lien which was then acquired upon the land was subject to all prior conveyances or incumbrances. A judgment creditor upon filing a creditor's bill for his sole benefit establishes, it is true, a prior lien in his own favor, but only as

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against parties who do not have liens prior to his own, and as the plaintiff has conceded, and it has been found in the lien suits, that the petitioners, with the exception of Foti, are entitled to have and maintain their liens, the same having related back to the date when the contracts under which the liens were claimed were made, which was long prior to that of the attachment, [although after the making of the mortgage,] I think it must be found that they are entitled to payment out of the surplus unless the plaintiff has a superior claim thereto by reason of his diligence in creating it. While he might have such a claim as against other judgment creditors, I do not think he is entitled to it as against the lien petitioners. The fund is not sufficient to permit of payment to the lienors in full, but I find that they should share in it *pro rata*, all of them having contributed to create the value of the property; I think also that the plaintiff should be allowed his costs and a reasonable attorney's fee to be deducted from the fund before the distribution is made."

The Superior Court overruled the exceptions to the master's report, and made a final decree in accordance with the recommendations of the master. The plaintiff appealed.

C. S. Tilden, for the plaintiff.

C. T. Cottrell, for the Standard Plate Glass Company, and *H. M. Whiting*, for Hazen B. Chapman and W. Bowman Cutter, intervening petitioners, were not called upon.

No counsel appeared for the defendants.

MORTON, J. The question is whether the plaintiff or the lienors are entitled to the surplus in the hands of the mortgagee. It is conceded by the plaintiff that the liens when filed took effect as of a date prior to his attachment. Petitions were brought to enforce the liens, but, although the amounts due were determined, they never were prosecuted to final judgment, — the reason being that the property had been sold under foreclosure proceedings, — and the plaintiff contends that the lienors have no rights in and to the fund, and that, it having been secured by his superior diligence, he is entitled to a preferred payment.

It is plain, as was said in the memorandum filed by the judge before whom the hearing upon the intervening petitions was had in the Superior Court, that, if the petitioners had perfected their liens by a final decree, then under the authority of *Knowles*

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v. *Sullivan*, 182 Mass. 318, they would have established an interest in the surplus. In other words the fact that the property was sold would not have deprived the petitioners of a remedy, but their liens would have attached to the surplus in the hands of the mortgagee. See also *Wiggin* v. *Heywood*, 118 Mass. 514; *Western Union Telegraph Co.* v. *Caldwell*, 141 Mass. 489. We do not think that the attachment of the liens to the surplus was defeated or lost because the proceedings to enforce the liens were not pursued to a final decree. The amounts due were determined, but it would have been useless to enter final judgments ordering a sale of the property. We assume, as the plaintiff contends, that the bill is brought under the general equity powers of the court and not under R. L. c. 159, § 3, cl. 7, and that generally speaking in order to maintain such a bill it must appear that the claim has gone to judgment and execution (*Carver* v. *Peck*, 131 Mass. 291); but the rule is not an absolute one, and does not apply where a judgment and execution would be of no practical utility. *Case* v. *Beauregard*, 101 U. S. 688. Manifestly in the present case an order of sale would have accomplished nothing and would have been a useless formality. It would be absurd to hold that the lienors lost the benefit of the rights which equity had transferred to the surplus in the mortgagee's hands because they did not obtain an order of sale. The most that the plaintiff could insist upon was that the amounts due should be determined in the proceedings to enforce the liens and that was done. If the surplus had been unencumbered by any liens in favor of the intervening creditors, there would be strong ground for holding that the plaintiff was entitled to a preference by reason of his superior diligence. *Freedman's Savings & Trust Co.* v. *Earle*, 110 U. S. 710. *Edmeston* v. *Lyde*, 1 Paige, 637, 640. *Gordon* v. *Lowell*, 21 Maine, 251, 257. But we know of no principle of law or equity by which the liens can be divested in his favor, or by which it can be held that they did not attach because the surplus was created by his activity. It was within the power of the court to award him costs and counsel fees out of the fund, if it saw fit, and it has done so. But that is as far as it could go. The result is that the decree must be affirmed.

So ordered.

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2. In an action against a corporation for abuse of legal process in instituting criminal proceedings against the plaintiff solely for the purpose of compelling him to surrender possession of a house occupied by him as a tenant, where the defendant contends that the person who instituted the proceedings acted without its authority, if it appears that the house occupied by the plaintiff was leased to the defendant and was placed in charge of the defendant's bookkeeper who let it to the plaintiff for the purpose of keeping a boarding house for the defendant's employees, that the bookkeeper instituted criminal proceedings against the plaintiff and caused him to be arrested for the purpose of getting rid of him as a tenant by forcing him to give up the house, and that a director of the defendant empowered to act as general manager of its business and the defendant's president both had knowledge of the measures taken and either assented to them or declined to interfere, there is evidence to justify a finding that the defendant ratified the acts of its bookkeeper, even if original authority had been wanting, and to warrant a verdict for the plaintiff. *Ibid.*

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2. A driver employed by a teamster who, after having completed his regular work for the day, is driving back to his employer's stable by a route which is not the shortest but which he chooses because the shortest route is blocked by teams, is acting within the scope of his employment, and if on the way he goes into a pool room to get some tobacco, negligently leaving the horse unhitched and unattended, and the horse runs away and injures a person lawfully on the highway, the employer of the driver is liable for the injuries thus caused. *Hayes* v. *Wilkins*, 223.

3. If a servant while driving the horse of his master within the scope of his employment negligently leaves him standing unhitched and unattended in order to enter a building upon an errand of his own, and the horse runs away and injures a person lawfully upon the highway, the negligence of the servant in leaving the horse while in his charge is the direct and proximate cause of the injury and his purpose in entering the building, which remotely caused the accident, is immaterial. *Ibid.*

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For Benefit of Creditors.

2. If an assignment for the benefit of creditors is executed by the assignee, who also is one of the creditors, the signature of the assignee operates as an acceptance of the provisions of the instrument by him as a creditor, and his title as assignee, at least to the extent of his claim, becomes good against a subsequent attachment of property of the assignor by another creditor, although no creditor except the assignee has executed the assignment. *Reddy* v. *Raymond*, 367.

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Where Boston broker at request of New York broker purchases stocks and carries them on margins supplied by New York broker, latter acting for customers employing him to purchase stocks on margins in Boston market, but Boston broker not knowing such fact, and New York broker is adjudicated bankrupt, trustee in bankruptcy of New York broker has no claim on stocks in possession of Boston broker, they belonging to New York broker's customers whose agent Boston broker was, see AGENCY, 1.

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1. In an action against the indorser of a promissory note, although the production of a note in the ordinary form is *prima facie* evidence of a consideration, the burden of proof always is on the plaintiff to show that there was a consideration if this is denied by the defendant. *Lombard* v. *Bryne*, 236.

Unauthorized Indorsement.

2. A person who takes from a special agent a check payable to his principal and indorsed by the agent is bound to inquire and ascertain whether the agent had authority to make such indorsement. *A. Blum Jr.'s Sons* v. *Whipple*, 253.
3. If a travelling salesman employed by a corporation as a special agent to make sales of wines and liquors, without authority to indorse checks payable to the corporation, indorses and negotiates such a check and embezzles the proceeds, the corporation can recover for the conversion of the check from the person who cashed it and caused it to be collected. *Ibid.*
4. If a special agent without authority to indorse checks payable to his principal indorses and negotiates such a check and embezzles the proceeds, and thereupon absconds and the principal as soon as he learns of the transaction institutes criminal proceedings against the agent, who never is found, and if more than two years later the principal for the first time informs the person who cashed the check of its wrongful indorsement, demands from him the amount of the check, and upon refusal brings an action for its conversion, the delay of the plaintiff, which has not injured the defendant, does not as matter of law constitute a ratification of the act of the agent in indorsing the check, nor does it show such negligence or laches as to preclude the plaintiff's recovery. *Ibid.*

Presentment.

5. Where the drawer, the drawee and the payee of a check are all in the same city or town, the check should be presented for payment before the close of banking hours on the day after its delivery, and its circula-

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tion from hand to hand by indorsement does not extend the time for its presentment. *Gordon* v. *Levine*, 418.

6. The dictum in Taylor v. Wilson, 11 Met. 44, 52, that a check may "be passed from hand to hand, and a reasonable time is allowed to each party receiving the same to present it for payment," is to be understood as referring only to the facts of that case where the check was sent to the payee in a city in another State and was forwarded for presentment in the usual course of business. *Ibid.*

7. If a check on a bank in a city is drawn and delivered in that city on Saturday and is not presented for payment until the following Friday, when the bank on which it is drawn has failed and closed its doors, the drawer of the check is discharged from liability to the payee to the extent of any loss that he has suffered from the failure to present the check for payment before the close of banking hours on Monday. *Ibid.*

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Rule of law in this Commonwealth, that there is presumption of fact that promissory note given by debtor to creditor for whole or part of indebtedness is received by creditor in payment, applies even where creditor is in State where rule of law is otherwise and accepts note there, if note is payable in this Commonwealth and is given for goods to be delivered here, see PAYMENT, 1, 2.

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Municipal.

The members of the board of health of a town cannot be removed by a vote of the inhabitants of the town. *Attorney General* v. *Stratton*, 51.

BOND.

Seal.

1. Where one has delivered a bond or deed in which a seal stands opposite his signature he equally is bound by the instrument as a specialty whether he affixed the seal before or after signing or adopted a seal which had been affixed by another before he signed or authorized another to affix the seal after he signed. *George N. Pierce Co.* v. *Casler*, 423.

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To dissolve Attachment.

2. *Semble*, that a bond to pay a judgment, given under R. L. c. 167, § 116, to dissolve an attachment, is valid and binding even if the attachment was not effective. *Walsh* v. *Brown*, 317.
3. Where the execution and delivery of a bond to dissolve an attachment and its approval by a magistrate constitute but one transaction, it does not matter whether the seals are placed upon the bond before or after its approval by the magistrate. *George N. Pierce Co.* v. *Casler*, 423.
4. In an action on a bond given to dissolve an attachment, where the defence is set up that the bond was made void by a material alteration consisting of the affixing of seals by unauthorized persons after the bond had been delivered, whether the burden is on the defendant to prove this defence, the burden being on the plaintiff to prove the execution of the instrument on which he has declared by showing that the seals were affixed before delivery, *quaere*. *Ibid.*

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BOSTON AND WORCESTER STREET RAILWAY COMPANY.

1. Under St. 1901, c. 455, and the general law relating to street railways, the selectmen of a town on the line of the Boston and Worcester Street Railway Company had power to grant a location to that company authorizing it to cross with its railway a public way substantially at right angles and imposing a condition that the company should carry its tracks under the public way and for this purpose should raise the way not exceeding seven feet at the highest place. *Hyde* v. *Boston & Worcester Street Railway*, 80.
2. The provisions of St. 1901, c. 455, and of the general law relating to street railways giving power to the selectmen of a town on the line of the Boston and Worcester Street Railway Company to grant a location to that company to cross with its railway a public highway substantially at right angles and to impose a condition that the company should carry its tracks under the highway and for this purpose should raise the highway not exceeding seven feet at the highest place, without providing that the railway company should make any compensation to the owners of abutting lands for injuries sustained by them from the construction of the railway in accordance with the grant of location, is constitutional, the

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original taking of land for the highway for the purposes of public travel, for which compensation is provided, having included the use of the highway for public travel by all reasonable devices. *Hyde* v. *Boston & Worcester Street Railway*, 80.

BOUNDARY.

1. If two persons, who own in common with another the fee in certain land and in a strip of land twenty-four feet wide adjoining it over which a private way is laid out, convey the principal lot of land to their co-tenant in common by a quitclaim deed which describes the land as bounding upon the private way and grants the right to use such way, reciting that the land is the same intended to be conveyed by a former deed named from one of the grantors to the same grantee, and the description of the land in the deed named plainly does not include any part of the way, and the number of square feet of land stated to be conveyed by each of the deeds is the same, the later deed conveys only the land described in the earlier one referred to, and no part of the fee of the land under the private way passes by it. *Gray* v. *Kelley*, 533.
2. A guardian was given by the Probate Court a license to sell a certain parcel of land belonging to his ward containing a number of square feet named "with the right in a private way adjoining." The ward owned such a right in a way twenty-four feet wide adjoining the land described and also owned an undivided share in the fee of the strip of land over which the way was laid out. Under this license the guardian executed a deed describing the land and giving its contents in square feet according to plans referred to in former deeds which excluded the strip of land twenty-four feet wide over which the way was laid out, conveying the right of way as follows: " with a free right in common with others thereto entitled to use said private way, subject always to a just share of the expense of keeping the same in good condition and repair." *Held*, that the deed, especially when taken with the license on which it was founded, did not convey or purport to convey the undivided interest of the ward in the fee of the strip of land twenty-four feet wide. *Ibid.*

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BRIDGE.

See WAY, 4.

BROKER.

Where Boston broker at request of New York broker purchases stocks and carries them on margins supplied by New York broker, latter acting for customers employing him to purchase stocks on margins in Boston market,

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but Boston broker not knowing such fact, and New York broker is adjudicated bankrupt, trustee in bankruptcy of New York broker has no claim on stocks in possession of Boston broker, they belonging to New York broker's customers, whose agent Boston broker was, see AGENCY, 1.

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CHARITY.

The Worcester Art Museum was organized under Pub. Sts. c. 115, "for the purpose of founding an institution for the promotion of art and art education in said Worcester; erecting and maintaining buildings for the preservation and exhibition of works and objects of art; making and exhibiting collections of such works, and providing instruction in the industrial, liberal and fine arts; for holding real and personal estate in the furtherance of this purpose; and for the holding and administering funds acquired by the corporation for these and kindred objects in accordance with the will of the donors. All of said property and funds of the corporation, however, are to be held solely in trust for the benefit of all the people of the city of Worcester." A gift was made by will to this corporation exceeding the amount of $1,500,000 which it was allowed to hold under R. L. c. 125, § 8. After the will was proved St. 1906, c. 312, was enacted authorizing the corporation to hold real and personal property to an amount not exceeding $5,000,000, which was more than the amount of its property as it would be when increased by the gift. The heirs of the testator brought a petition under R. L. c. 192, § 6, for leave to file an information in the nature of a *quo warranto* against the corporation to set aside the gift. *Held*, that, assuming that the remedy sought was the proper one if the right claimed existed, which was not passed upon, and assuming also that St.

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1906, c. 312, did not make the corporation's title good against all the world, which the court held that it did, the gift was one to a public charity and would not be allowed to fail through the incapacity of the donee to hold the property, and, if such incapacity existed, the court by applying the doctrine of *cy pres* would appoint a trustee to carry out the charitable intent of the testator, so that in any view of the case the petitioners had no "private right or interest" which had been injured by the corporation to bring them within the provisions of R. L. c. 192, § 6. *Hubbard* v. *Worcester Art Museum*, 280.

Commonwealth alone can question right of charitable corporation to hold property in excess of amount stated in charter, and, if property sufficient to make total holdings exceed such amount is given to such corporation, and afterwards Legislature passes act allowing corporation to hold property in excess of amount held before plus amount of gift, Commonwealth has waived right to terminate holding and has declared gift valid, see CORPORATION, 1.

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Effect of Unconstitutionality of Part of Statute.

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Consideration.

1. A party to a contract of sale in writing cannot contradict it as to the price to be paid. *Farquhar* v. *Farquhar*, 400.
2. Where a contract is modified by agreement of the parties by adding a provision not before contained in it the additional obligation requires no new consideration to support it, the modified contract taking effect by way of substitution. *Earnshaw* v. *Whittemore*, 187.

Implied: Common Counts.

3. One who refuses to complete work which he has contracted to perform on the real estate of another unless his construction of the contract, which afterwards turns out to be wrong, is adopted, can recover nothing for the work he has done or for the value he has added to the real estate. *Douglas* v. *Lowell*, 268.

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4. The use of a bridge by the public is not an acceptance of work done upon it by a contractor who voluntarily failed to complete his contract, and gives him no right of action against the city with which the contract was made. *Douglas* v. *Lowell*, 268.

5. The use by the owner of real estate of a structure on his land, upon which work has been done by a contractor who refused to complete his contract, is not an acceptance of the work analogous to the retention of a chattel which can be returned, and gives the contractor no right of action. *Ibid.*

6. Under the rule which seems always to have been assumed in this Commonwealth, if a person without authority to do so agrees that a city shall take and pay for certain materials and the city uses them, the fact that the city has benefited by the use of the materials gives the owner of the materials no right of action. *Ibid.*

7. One who has purchased a business under a contract in writing for a sum of money named in the contract cannot maintain an action for money had and received against the seller to recover a part of the sum paid on the ground that there was a mistake in the computation of the value of the business by which the price was fixed. If there was such a mistake the purchaser's only remedy is a suit in equity to reform or set aside the contract. *Farquhar* v. *Farquhar*, 400.

Where declaration alleging false representations whereby plaintiff was induced to sign agreement in writing, of which copy is annexed, contains another count, alleged to be for same cause of action, for money had and received based on oral agreement alleged to have been made before alleged date of agreement in writing, this last count is not bad on demurrer, see PLEADING, CIVIL, 1.

Modification.

Where contract is modified by agreement of parties by adding provision not before contained in it, no new consideration is required, see *ante*, 2.

Rescission.

Contract giving one party right of cancellation on failure of other party to perform gives such other party no right to call for cancellation after having failed to perform, see *post*, 16.

Facts held not to show that acceptance as payment of promissory notes given by debtor to creditor was procured by fraud of debtor and therefore subject to rescission by creditor, see PAYMENT, 3.

Unlawful Interference with Performance.

Bill in equity to restrain members of labor union and corporation for which plaintiff was doing work under contract from unlawfully conspiring to compel plaintiff to employ only union men in work and from interfering with him in performance of contract to do such work, see UNLAWFUL INTERFERENCE, 1–3.

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Validity.

8. Whether one who owes money to a corporation under the terms of a contract which the corporation fully has performed, when sued upon the contract, can set up the defence that it was *ultra vires*, here was not considered because the contract was held to be within the corporate powers of the plaintiff. *Worcester* v. *Worcester & Holden Street Railway*, 228.

Agreement in policy of accident insurance to refer to arbitration questions of liability arising under other provisions of policy is void, see INSURANCE, 3.

Superintendent of streets of city has no authority to make agreement with contractor as to construction of contract in writing previously entered into with contractor by mayor and superintendent under proper authority, see MUNICIPAL CORPORATIONS, 6.

Question whether defence of invalidity of contract is open under answer of general denial in action upon contract, raised but not passed upon, see PLEADING, CIVIL, 2.

Validity of contract between municipal authorities and street railway company providing for paving by company which, if imposed as condition of use of street by company would have been invalid, see STREET RAILWAY, 1-3.

Construction.

9. A contract with a city for laying upon a bridge a tar covering which was to be the foundation for wooden block paving described the required work as follows: "The flooring of the roadway of the bridge is to be covered with waterproofing, composed of two layers of a first quality, heavy tar roofing felt, of a brand satisfactory to the superintendent of streets. The layers are to be put on crosswise of bridge, each strip to lay over the previously laid strip, one-half its width, the lower strip being thoroughly mopped with hot roofing pitch. The layer as a whole is then to receive a thorough mopping with hot pitch before second layer is applied. The second layer is then to be applied in the same manner as the first and the whole finally to receive a heavy coating of pitch put on by flowing instead of mopping." *Held*, that this contract required the laying of two layers of tar roofing felt, each layer to consist of two thicknesses of felt. *Douglas* v. *Lowell*, 268.

Construction of contracts contained in policies or certificates of insurance, see INSURANCE, 1, 2, 12.

Sale of coal called "river anthracite" held on facts not to be sale by sample, see SALE, 1.

Construction of building contract, particularly in regard to liquidated damages provided for therein, see DAMAGES.

Construction of agreement in writing for drilling of artesian well turning upon meaning of word "water," see EVIDENCE, 5, 6.

Superintendent of streets of city has no authority to make agreement with contractor as to construction of contract in writing previously made with contractor by mayor and superintendent under proper authority, see MUNICIPAL CORPORATIONS, 6.

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Building Contract.

10. Where a building contract provides that the expenses incurred by the owner of a building in finishing it after the contractor has failed to do so "shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties," in the trial of an action upon the contract, if it appears that the architects' certificates of such expenses, which are put in evidence by the defendant, were made properly and seasonably and there is no evidence of bad faith in their issue, they are conclusive as to all matters within the authority of the architects. *Loftus* v. *Jorjorian*, 165.

11. Where a contract for the erection of a building provides that if the contractor fails to perform his part of the contract the owner may terminate the employment of the contractor and finish the work himself and if the unpaid balance of the amount to be paid under the contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner, and where a subsequent clause of the contract fixing the contract price provides "that the sum to be paid by the owner to the contractor for said work and materials shall be" the amount named, "subject to additions and deductions as hereinbefore provided," the contractor in suing on this contract, after he has failed to complete his work and the building has been finished by the owner, in order to recover must show affirmatively that the balance due him exceeds the amount of the expense properly incurred by the owner in finishing the work, and for this purpose expenses properly incurred by the defendant must be deducted although their amounts were determined after the commencement of the action and for that reason they could not be included by the defendant in a declaration in set-off. Such expenses are not deducted by way of recoupment and may be shown by the defendant under a general denial. *Ibid.*

Construction of building contract as to liquidated damages provided for therein, see DAMAGES.

Performance and Breach.

12. In an action against a city on a contract to do certain work upon a bridge it appeared that the plaintiff refused to go on with the work required by the contract unless a certain construction of the contract, which afterwards turned out to be wrong, was adopted, and that the defendant gave to the plaintiff a certain time to decide whether he would go on with the work in accordance with the defendant's rightful construction of the contract. There was evidence that the plaintiff when asked whether he would complete the contract according to the defendant's construction of it said "I am ready and willing to carry out my contract." The plaintiff contended that this warranted a finding that he was ready and offered to complete the contract on the defendant's construction of it. *Held*, that the words of the plaintiff could not be given this meaning. *Douglas* v. *Lowell*, 268.

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13. In an action against a city on a contract to do certain work upon a bridge, in which it appeared that the plaintiff refused to complete the work required by the contract unless a certain construction of the contract, which afterwards turned out to be wrong, was adopted, the plaintiff testified that the defendant's superintendent of streets, who jointly with its mayor had been authorized to make the contract, told the plaintiff on the day before his refusal to go on with the work that he had let the work to another contractor, and a contract with this other contractor, dated the day after the plaintiff's refusal to go on with the work, was offered in evidence by the plaintiff and was excluded by the judge. It appeared that on the morning of the day following the statement of the superintendent of streets which was testified to by the plaintiff, the plaintiff was at the bridge with his men and materials ready to go on with the work if his construction of the contract was adopted, and that the defendant gave him until one o'clock on that day to decide whether he would go on with the work in accordance with the defendant's rightful construction of the contract, which he refused to do. The plaintiff excepted to the exclusion of the contract with the other contractor, contending that it should have been admitted in evidence because of the statement of the superintendent of streets. *Held*, that the contract offered in evidence, dated the day after the plaintiff's refusal, did not tend to prove that the contract had been given to the other contractor on the day before such refusal, and that the statement of the superintendent of streets, if it bound the defendant, was immaterial, as the plaintiff did not act on it, but appeared the next morning ready to go on with the work and was given until one o'clock to decide whether to do so. *Douglas* v. *Lowell*, 268.

14. In an action for the alleged breach of a contract in writing to purchase at an agreed price one fourth of the capital stock of a corporation formed to utilize an invention of a machine for cutting cloth in case a certain lawyer should give an opinion that the invention was patentable, it appeared that the lawyer named gave an opinion in writing in substance to the effect that the invention was a new one but that whether it was patentable or not depended upon the practical question to be determined by experts whether the device was an important one for use in cloth cutting machines. *Held*, that this was not an opinion that the invention was patentable and that the defendant was not bound to purchase the stock. *Randall* v. *Claflin*, 560.

15. In an action for the alleged breach of a contract in writing under seal to purchase at an agreed price one fourth of the capital stock of a corporation which the plaintiffs were about to form to utilize an invention of a machine owned by them in case a certain lawyer should give an opinion that the invention was patentable, and providing further that, if the lawyer should give an opinion that the invention was not patentable, the defendant should have an option to take and pay for the stock, and that the defendant should determine whether he would or would not purchase the stock as soon as the opinion of the lawyer was received, provided the opinion was unfavorable, it appeared that the corporation was formed in the manner contemplated and represented all the interest of the plaintiffs in

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the invention, that before the opinion of the lawyer was given there was in the stock book of the corporation an unissued certificate for one quarter of the shares of the capital stock of the corporation made out in the name of the defendant, that the lawyer gave an opinion which was not an opinion that the invention was patentable, that thereupon the defendant told one of the directors of the corporation, who was the son of the treasurer of the corporation, that he had decided not to go on with the contract, that the son of the treasurer narrated this conversation to the treasurer, who was one of the parties to the contract, that the defendant himself afterwards stated his decision to the treasurer, that thereupon the treasurer had the defendant sign an indorsement on the back of the unissued certificate in the stock book which had been made out in his name, that thereafter the shares were treated as stock in the treasury of the corporation, and that for eight years the plaintiffs, although seeing the defendant frequently, never questioned his determination or suggested that he was liable under the contract. *Held*, that the defendant was not required by the contract to give formal notice to the plaintiffs either in writing or orally of his determination not to purchase the stock, and that his indorsing the certificate, thereby relinquishing his right to the stock, was an overt act sufficiently communicating such determination. *Held*, *also*, that the conversation between the defendant and the son of the treasurer, afterwards communicated to the treasurer, in which the defendant told the son of his decision not to go on with the contract was admissible in evidence against the plaintiffs. *Randall* v. *Claflin*, 560.

16. At the trial of an action for the price of bottles sold under a contract in writing, in which the defendant did not deny the amount of the plaintiff's claim but alleged in recoupment a breach of contract by the plaintiff from which the defendant had sustained damages to an amount greater than that claimed by the plaintiff, it appeared that after a part of the bottles had been delivered the contract was modified by adding a provision that "bottles called for on this contract are to be made by union workmen or this contract cancelled," that after repeated demands by the defendant for union made bottles the plaintiff informed the defendant that he could not furnish such bottles and suggested that the contract be cancelled, that the defendant declined to terminate the contract and demanded its performance, claiming damages for the plaintiff's failure to deliver the bottles called for, and also transferred his moulds which had been in the possession of the plaintiff to another manufacturer. The trial judge ruled that the defendant could recoup damages to the extent of the plaintiff's claim, and, as the damages suffered by the defendant exceeded the claim of the plaintiff, found for the defendant. *Held*, that when the plaintiff refused to perform his part of the contract the defendant not only became entitled to recover such damages as had been caused by the breach but also was excused from further performance on his part, and that the transferring of the moulds was no breach of the contract on the part of the defendant as it was done after the refusal of performance by the plaintiff; that the option of the right of cancellation, which was given by the contract in case of a failure by the plaintiff to furnish bottles made

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by union workmen, was for the sole benefit of the defendant and did not deprive him of his right to demand and recover damages for the plaintiff's breach of contract; therefore that the defendant was entitled to judgment. *Earnshaw* v. *Whittemore*, 187.

17. In a suit in equity by a street railway company to compel the specific performance of a contract to convey to the plaintiff a strip of land on the proposed location of its railway, the contract sought to be enforced, giving an option to purchase the land, provided as follows: "This option may be accepted in writing by said corporation within ninety days from this date and within thirty days after such acceptance, said conveyance shall be made by warranty deed . . . whenever and wherever said corporation shall tender said agreement after seven days' notice by it of the time and place of tender." It appeared that the plaintiff accepted the option within the ninety days named but did not offer performance and demand a deed from the defendant until thirty days after the acceptance had expired, although five days after such expiration the plaintiff tendered the purchase money and a deed for execution by the defendant and then gave the defendant seven days' notice of a time and place of performance, in accordance with which the parties met and the defendant refused the plaintiff's tender of performance. *Held*, that, although the provision fixing the time within which the option might be accepted was of the essence of the contract, the provision which stated the time after the acceptance within which the deed must be delivered was not of such essence, and that the plaintiff was entitled to a decree for specific performance in spite of its failure to tender performance and demand a deed within thirty days after its acceptance of the option. *Boston & Worcester Street Railway* v. *Rose*, 142.

18. In a suit in equity by a street railway company to compel the specific performance of a contract to convey to the plaintiff a strip of land on the proposed location of its railway, where under the contract proved it was the duty of the defendant to prepare and deliver a deed, and the plaintiff was to pay a sum of money and to do certain things upon the land which could not be done until it acquired title to it, the plaintiff showed that it tendered the money and offered a deed for execution by the defendant, which did not contain a statement of all the things to be done by the plaintiff as a part of the consideration, that the defendant refused to sign this deed and never prepared or tendered a deed, that a formal notice in writing given by the plaintiff to the defendant of the time and place of performance stated that the plaintiff would be ready to receive the conveyance of the land and "to tender the consideration therefor" at the time and place named, and that the defendant at the time and place named neglected to prepare a deed, and refused to carry out his contract on grounds other than the failure of the plaintiff to include in the deed prepared by it all the agreements made by the plaintiff, and there was nothing to indicate that the plaintiff ever refused to perform those agreements when it should receive its title. *Held*, that the evidence warranted a finding that there was a sufficient offer of performance on the part of the plaintiff to enable it to maintain its bill. *Ibid.*

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19. In an action on a bond to convey to the plaintiff certain land of which he was in possession, when the defendant had discharged certain attachments on the land, upon the plaintiff giving a note for a certain sum secured by a mortgage of the land, on which the plaintiff had built houses with money lent to him by the defendant to be included in the sum secured by the mortgage, with a provision that until the conveyance was made the plaintiff should pay interest and taxes and keep the buildings on the premises insured, there was evidence, including the plaintiff's testimony, that after the execution of the bond, the plaintiff being about to build an additional house on the land, the defendant agreed to lend him the money necessary for this purpose and agreed that the interest due from the plaintiff to the defendant should be treated as part of the money so lent and should be applied by the plaintiff directly to paying bills incurred in erecting the additional house, and that the amount should be included in a second mortgage to be given by the plaintiff to the defendant at the time of settlement, that after the additional house had been built under this arrangement the plaintiff by agreement with the defendant put the houses he had built into the defendant's possession and permitted him to receive the rents to apply upon the payment of interest and taxes, and that the amount so received by the defendant was in excess of all sums due for interest and taxes, when the plaintiff tendered a mortgage note for the amount due under the bond and demanded a conveyance of the land. The presiding judge refused to order a verdict for the defendant, and the jury returned a verdict for the plaintiff. The defendant upon the argument of exceptions relied on the following provision of the bond, under which he contended that he had taken possession of the land: "And it is expressly provided and agreed that upon failure by the obligee to perform the aforesaid conditions in regard to the payment of interest, taxes, and assessments, and in regard to insurance, waste and liability, the obligor may take possession of the premises and collect for his own use the rents and profits thereof, and this obligation shall be absolutely void." It did not appear that this contention was made at the trial. The defendant also contended that the plaintiff had failed to pay the taxes on the land and the interest on the advances for the house last built by the plaintiff. The defendant never had asked for an accounting to fix the amount to be secured by the second mortgage for advances on this house. *Held*, that, if the defendant had contended at the trial that he had taken possession under the forfeiture clause of the bond, the question whether he had done so would have been one for the jury, and they could not have found for the defendant on this issue without finding that the plaintiff's testimony was untrue; moreover, that, if there had been such a forfeiture, it would have been one against which equity would give relief on compensation being made within a reasonable time and that this principle would have governed an accounting, which the plaintiff had sought; that the verdict of the jury included a finding that the plaintiff had put into the hands of the defendant sufficient funds to pay all taxes and interest, and that, as to interest on the advances for the house last built, there could be no default until there had been an accounting to fix

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the amount to be secured by the second mortgage for those advances, for which the defendant never had been ready. *Mead* v. *Morse*, 201.

20. In an action against a city for an amount awarded as damages for land taken for the laying out of a street with interest on the award from the time the defendant began the construction of the street, the defendant set up an instrument under seal executed by the plaintiffs and other land-owners whereby they agreed as follows: "We, . . . in consideration of the immediate laying out and construction of said proposed street at the width of fifty feet, . . . and of any assessments which may be laid upon our several estates for the cost of said laying out and construction being delayed until the damages caused to us severally by the taking of said land and the cost of the construction of said street shall be determined, and of said damages being offset against the proportionate part of said cost which may be levied upon our respective estates, agree that the payment for said damages shall be delayed until the balance due from us severally after making said offset has been determined." It appeared that the street was laid out and constructed within a reasonable time, but that no assessment for betterments was made until after the action was begun, when betterments were assessed under a statute which was enacted after the work was done. The assessment was valid and exceeded in amount the damages awarded to the plaintiffs. The betterments might have been assessed sooner, but the plaintiffs never had requested an assessment nor asked for a determination of the balance due from them. The plaintiffs contended that as the defendant had not made the assessment promptly they were entitled to interest on their award for damages from the date of the beginning of construction and were not obliged to set off their damages against the betterments. *Held*, that the setting off of one claim against the other and determining the balance was to be done by the parties jointly, and that the plaintiffs could not hold the defendant delinquent in failing to assess the betterments promptly until the plaintiffs had requested an accounting and a determination of the balance and the defendant had failed to assess the betterments within a reasonable time after such request. *Held, also*, that the fact that the assessment was made under a statute enacted after the work was completed was immaterial, as the writing bound the parties in regard to any assessment lawfully made to meet the expenses of the laying out and construction of the street, and such an assessment could be made under a statute passed after the work was done. *Boston Water Power Co.* v. *Boston*, 571.

One who refuses to complete work which he has contracted to perform on another's real estate unless his construction of contract, which afterwards turns out to be wrong, is adopted, cannot recover for work done on or value added to real estate, see *ante*, 8.

CONVERSION.

Corporation can recover from person cashing for special agent of corporation check payable to its order and indorsed without authority by agent and

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afterwards collected from corporation, for conversion of check, agent having embezzled proceeds, see BILLS AND NOTES, 3.

CORPORATION.

Evidence of Incorporation.

Court takes judicial notice of special acts of incorporation, see EVIDENCE, 1.

Charitable.

1. Under R. L. c. 125, § 8, by the terms of which a corporation organized for a charitable purpose "may hold real and personal estate to an amount not exceeding one million five hundred thousand dollars," a gift made by will to such a corporation in excess of that amount is good against every one but the Commonwealth, and if, after the will is proved, the Legislature passes a special statute authorizing the corporation to hold real and personal property to an amount exceeding that of its property when increased by the gift, this operates as a waiver of the right of the Commonwealth to terminate the holding, and as a legislative declaration of the validity of the gift. *Hubbard* v. *Worcester Art Museum*, 280.

For administration *cy pres* of charitable trust, see CHARITY.

Foreign.

2. A tax lawfully may be assessed to a foreign corporation doing business in this Commonwealth upon its personal property situated here and need not be assessed *in rem* against the property itself. *Scollard* v. *American Felt Co.* 127.

3. In St. 1902, c. 349, providing that if a foreign corporation doing business in this Commonwealth fails to pay within sixty days a tax lawfully assessed and payable the collector of taxes of the city or town where the tax was assessed may maintain a petition to restrain the corporation from doing business in this Commonwealth until the tax is paid, the provision that service may be made by leaving a copy of the petition at the place where the business is carried on is reasonable and valid, and this provision for service is not repealed or superseded by anything contained in St. 1903, c. 437. *Ibid.*

4. The provision of St. 1903, c. 437, § 71, which makes a foreign corporation doing business in this Commonwealth subject to taxation on machinery and merchandise owned by it and situated in the Commonwealth by the city or town in which such property is situated is constitutional, and if such a tax has been assessed properly and has remained unpaid for sixty days after it was payable, the collector of taxes of the city or town where the tax was assessed can maintain a petition under St. 1902, c. 349, to restrain such foreign corporation from doing business in this Commonwealth until such tax is paid, irrespective of the question whether the portion of St. 1903, c. 437, § 71, in regard to the collection of such taxes is invalid, because that part of the statute is separable from the rest, and also irrespective of the question whether the method provided by St. 1902,

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c. 349, for enforcing the payment of a tax upon property of a non-resident natural person doing business in this Commonwealth is constitutional, because that provision also is separable from the rest of the statute which contains it. *Scollard* v. *American Felt Co.* 127.

Officers and Agents.

Duties and liabilities of directors.

5. The directors of a corporation act in a strictly fiduciary capacity and are held to the high standard of duty required of trustees. *Elliott* v. *Baker*, 518.

Bill in equity to enforce statutory liability of directors of street railway company under R. L. c. 112, § 19, see EQUITY JURISDICTION, 9–15.

Responsibility for acts of agent.

Action of bookkeeper of corporation in instituting criminal proceedings for sole purpose of getting rid of tenant of corporation held either to have been authorized or ratified by acts of officers of corporation, so that corporation was liable, see ABUSE OF LEGAL PROCESS, 1, 2.

Rights of Stockholder.

6. St. 1903, c. 437, § 30, giving to a stockholder in a corporation the right to inspect its records and its stock and transfer books, has no application to the corporation's books of account and deposit. *Varney* v. *Baker*, 239.
7. Under the common law of this Commonwealth the stockholders of a corporation when acting in good faith for the purpose of advancing the interests of the corporation and protecting their rights as owners should be permitted to examine the corporate property including the books and accounts. *Ibid.*
8. The common law right of a stockholder of a corporation to examine its books and accounts is not an absolute one, and will not be enforced by a writ of mandamus for purposes of mere curiosity or of speculation or vexation. Upon an application for the writ the court will consider whether the petitioner's desire for an examination is reasonable in reference to the interests of the corporation and those of the petitioner as a member of it. *Ibid.*
9. On a petition by a stockholder of a corporation for a writ of mandamus to obtain an examination of its books of account, if it appears that the petitioner is the owner of eighty out of three hundred and fifty shares constituting the capital stock, that the corporation three or four months before the filing of the petition lost several thousand dollars, although its officers testify that at the time of the hearing the corporation is in a prosperous condition, that the petitioner believes that the corporation is being mismanaged and desires in good faith to examine its books and records for the purpose of ascertaining its condition and the value of its stock, and if it also appears that an examination can be conducted without interfering unduly with the business of the corporation, although it is not proved that there is any mismanagement in fact or any incapacity on the part of the managing officers, the petitioner should be permitted to

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examine the books in accordance with his request, and such an examination includes the right to have the assistance of an expert, or other person, if he desires to make transcripts from the books for subsequent use. *Varney* v. *Baker*, 239.

Shares wrongfully issued.

10. If in a contest for the control of a corporation a majority of the directors of the corporation sell and issue a large number of shares held in the treasury of the company to a person on their side of the controversy, which with the shares already held and controlled by them will give them control of the corporation, and if the issuing of the shares is not reasonably necessary to raise money to be used in the business of the corporation but the majority of the directors issue the shares in pursuance of a secret arrangement between them and the purchaser of the shares for the purpose of ousting the leader of the opposing party who before such issue had acquired with his friends the control of the outstanding stock of the company, and if the price paid for the new shares while fair under ordinary circumstances is less than probably might have been obtained in view of the contest for the control of the corporation, although the majority of the directors believe that it is for the best interests of the corporation that its control should be in their hands, their action in issuing the shares is in excess of their authority and constitutes a breach of trust, and in a suit in equity brought by the opposing stockholders the court will order the cancellation of the certificate for the new shares and the return of the shares to the treasury of the corporation. *Elliott* v. *Baker*, 518.

Records.

Right of stockholder to examine books and records of corporation, see *ante*, 6–9.

Taxation.

Taxation of machinery and merchandise of foreign corporation situated in this Commonwealth, see *ante*, 2–4.

Corporation Responsible like other Person.

Corporation liable like private person for conspiring to effect unlawful interference with contract, see UNLAWFUL INTERFERENCE, 1.

Ultra Vires.

Question whether one sued by corporation on contract which corporation fully has performed can set up defence that contract was *ultra vires* raised but not passed upon, see CONTRACT, 8.

Gift to charitable corporation in excess of authorized capital, see *ante*, 1.

COVENANT.

Grantor of land who has covenanted and warranted land to be free from incumbrances made or suffered by him cannot maintain action on oral

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Covenant (continued).

promise of grantee to pay as part of consideration tax assessed before signing of deed, see EVIDENCE, 7.

Covenant in deed of warranty against claims of all persons claiming by, through or under grantor is not broken by existence of easement for laying and maintaining sewer taken by city by right of eminent domain before deed was given, see DEED.

CUSTOM.

On question of due care of lineman of telephone company, who had been struck by passing street car while at work on pole, evidence that it was customary for men on ground to warn man on pole of approaching car held admissible, see NEGLIGENCE, 43.

Custom of superintendent of wires not to issue permits for extension of electric wires under certain circumstances held not admissible in evidence to excuse plaintiff's failure to procure such permit, see NEGLIGENCE, 66, 67.

CY PRES.

See CHARITY.

DAMAGES.

Small Claims.

Smallness of claim is proper ground for refusing relief in equity, EQUITY JURISDICTION, 1; and assessment of damages for wrongful use of trade name will not be referred to master where it appears that amount of damages is so small as to be exceeded by cost of hearing, see *ibid.* 6.

Liquidated.

A landowner, who was constructing a building on his land for the purpose of letting stores and tenements, after a contractor who had agreed to finish the building by August 1 had failed, undertook to finish the building himself. When the building was ready for the doors, he made a contract with a manufacturer for certain numbers of doors, windows, sashes and blinds, to be finished within certain numbers of days named varying from one to twenty. At the time of making the contract, which was dated August 26, the landowner informed the manufacturer that he was in a great hurry to receive the doors in order that they might be put in at once as they were received and that it was important for purposes of letting that the whole building should be ready for the fall season. Thereafter there was inserted in the contract the following clause: "In case of any failure on his part to perform this agreement within the time specified according to the tenor thereof said R. agrees to pay said M. the sum of $10 per day until he shall have fully performed said agreement, as damages." The contract called for eighty cypress doors to be delivered in eight days. The cypress doors were to be used in the tenements.

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Twenty-eight of these doors were furnished by the manufacturer and were used to finish one tenement which was let to a tenant early in October. In some of the other tenements tenants moved in paying less than the full rent until the doors were finished. In an action by the landowner against the manufacturer for a breach of the contract, it was *held*, that the provision of the contract above quoted must be interpreted in view of the circumstances under which it was adopted and as relating to a substantial and not to a trifling or unimportant breach of the contract, and so interpreted it should be enforced as an agreement for liquidated damages; *also*, that the fact that the plaintiff let a part of the premises and used a part of the doors did not affect his right to recover the stipulated damages, as the provision that in case of failure of performance within the time specified the defendant should pay the sum of $10 per day "until he shall have fully performed said agreement" covered a partial breach as well as an entire one. *Morrison* v. *Richardson*, 370.

Covenant in lease that if lessor shall decide to remove buildings he may terminate lease by paying lessee $2,500 does not constitute agreement for liquidated damages, see LANDLORD AND TENANT, 6.

To Real Estate.

Measure of damages in action by owner of real estate against owner of adjoining land for injury to party wall due to defendant's digging on his own land, see NEGLIGENCE, 62.

Recoupment.

Where defendant in answer in action on contract in writing for sale of goods which plaintiff warranted sets up damages from breach of warranty and judgment is rendered for plaintiff, defendant cannot afterward bring action for breach of warranty, see JUDGMENT, 8.

In action by contractor against landowner on building contract which provides that, if contractor fails to finish work and owner does so, contractor shall recover only balance that amount due on contract price at time contractor ceased work exceeds expense to owner of finishing work, allowance to owner of such expense is not by way of set-off or of recoupment, and plaintiff to recover must show affirmatively that balance due him exceeds such expense, see CONTRACT, 11.

DANGEROUS ARTICLE OF MERCHANDISE.

Action by workman in factory against manufacturer of emery wheel, sold to workman's employer, which burst and injured plaintiff, see NEGLIGENCE, 74.

DEED.

Delivery.

Effect of delivery of bond or deed by one opposite whose signature stands seal, see BOND, 1.

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Construction.

Construction of terms of deeds, with regard to whether boundary line is at side of private way or includes way, see BOUNDARY, 1, 2.

Interpretation of lease as to what premises were included in description, see LANDLORD AND TENANT, 1.

Deed of conveyance of land, absolute on its face, may be shown by assignee through mesne conveyances of grantor to have been given as security and intended as mortgage, see EQUITY JURISDICTION, 4.

Covenants.

The appropriation of private property for a public use under the right of eminent domain is a proceeding *in rem*, and the title acquired is an independent one not derived from that of the owner of the land. Therefore the existence of an easement which was taken by a city under the right of eminent domain in a strip of land for the purpose of laying and maintaining a sewer is not a breach of a covenant in a deed of the land warranting the title against the lawful claims and demands of all persons claiming by, through or under the grantor. KNOWLTON, C. J. & HAMMOND, J. dissenting. *Weeks* v. *Grace*, 296.

Grantor of land who has covenanted that premises are free from incumbrances made or suffered by him and has warranted against such incumbrances cannot maintain action on oral promise of grantor to pay as part of consideration tax assessed before signing of deed, see EVIDENCE, 7.

DEVISE AND LEGACY: CONSTRUCTION.

Construction after Republication.

1. The rule of construction that the republication of a will by a codicil does not alter the meaning of the words of the will does not apply when the clause of the will to be construed has been changed by the codicil. *Brown* v. *Wright*, 540.

Who are "Right Heirs" or "Heirs at Law."

2. Under R. L. c. 154, § 7, the adopted daughter of a deceased brother of a testator cannot share in a bequest to the heirs of the testator. *Brown* v. *Wright*, 540.
3. The effect of the word "right" in a bequest to a testator's "right heirs at law," which apparently was used to exclude the possibility of a construction including an adopted child, here was not passed upon because the adopted child of a deceased brother of the testator was not an heir at law of the testator in any case. *Ibid.*
4. Where a will provides that after the death of the testator's widow, the income of a portion of his estate shall be paid to the testator's son, his only child and heir presumptive, that the income of the remaining portion of the estate shall accumulate during the life of the testator's son, and that on his death, leaving no issue surviving him, the trustee for the time

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being shall pay over and distribute all that shall remain of the property to the testator's "right heirs at law," the persons so described are to be ascertained as of the date of the death of the testator's son. *Brown* v. *Wright*, 540.

5. A testator made a will, when he had two sons living, providing that, after the termination of the life interests created by the will for the benefit of his wife and of his two sons and the payment of certain legacies, the trustee for the time being should pay over and distribute all that should then remain of his property and estate to the issue of his two sons, or failing such issue, to the testator's "right heirs at law." On the death of one of his sons leaving no issue, the testator made a codicil ratifying and confirming his will except so far as changed by that instrument, in which, among other changes, he expressly revoked the provisions for his deceased son and his issue, and gave the remainder of his property and estate to the trustee named in his will "to be held, managed and disposed of as trustee in said will provided excepting so far as changed and modified by this codicil." He gave to his surviving son, after the death of the testator's wife, the income of $20,000 instead of the income of $10,000 given him by the will, provided for additional bequests to be paid after the death of the testator's wife and changed one of his executors. At the time of making the codicil the testator was an old man and acted on the assumption that his surviving son would be his only child at the time of his death. After the death of the testator's wife and the payment of legacies to be paid at that time, there was left in the hands of the trustee a fund of about $50,000, and, on a bill for instructions by the trustee, this court held that the income of the estate over and above the income on $20,000 which was given to the testator's son for life was to be accumulated until the time of his death. On the death of the testator's son without issue, the trustee brought a bill for further instructions as to who were the testator's "right heirs at law" among whom the fund should be distributed. *Held*, that the fund should be distributed among those persons who would have been the heirs at law of the testator had he died at the time of the death of his son. *Ibid.*

6. Under St. 1900, c. 450, § 4, now embodied in R. L. c. 140, § 3, cl. 3, a widow sharing in a gift to the "legal heirs" of her husband is entitled to one half of the property, and the provision in regard to her first taking $5,000, which relates only to personal property, has no application. *Holmes* v. *Holmes*, 552.

7. Where a will contains a limitation of a fund consisting of both real and personal property to the "legal heirs" of a person named and there is no indication that the real estate and the personal property are to be treated separately, the whole of the fund goes to those persons who under the laws in force at the time of the death of the person named would be entitled to inherit his real estate if he had died intestate. *Ibid.*

8. A testator died leaving both real and personal estate. A widow and a son survived him. He devised and bequeathed all his property to a trustee, and directed the trustee at the expiration of "five years to divide one third of all my estate between my said wife and son in proportions

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of one third thereof to my wife and two thirds thereof to my son. At the expiration of ten years from my decease to divide one half of my estate then remaining in the hands of my said trustee between my said wife and son in the same proportions. At the expiration of fifteen years to divide all the remainder of my estate between my said wife and son in the same proportions. If either my wife or son should die before the expiration of fifteen years to pay to the survivor the deceased person's share. If both should die before the expiration of said fifteen years to pay over all my estate to the legal heirs of the survivor as soon after his decease as may be found practicable." The testator's widow waived the provisions of his will, and died within three years after the death of the testator. His son died more than five years and less than six years after the death of the testator, leaving a widow and no issue. The heirs by blood of the son claimed the remainder to his "legal heirs" to the exclusion of his widow. *Held*, that on the expiration of five years from the death of the testator the testator's son became entitled to one third of the fund, that on his death the remaining two thirds vested in his legal heirs to be determined at the date of his decease, and that these were the persons who would have been entitled to inherit his real estate if he had died intestate, which included his widow and gave her under St. 1900, c. 450, § 4, now embodied in R. L. c. 140, § 3, cl. 3, one half of the remainder. *Holmes* v. *Holmes*, 552.

What Estate passes.

9. The will of a testatrix disposed of her property as follows: "I give, devise, and bequeath to my sister E. all my real estate, and personal property, for and during her natural life: with the privilege of disposing of any, or all, of said real estate, if she should at any time deem it expedient to do so. At her decease the property to be equally divided as follows: one third to my brother J., or his heirs; one third to my brother F., or his heirs; one third to the children of my lately deceased sister M." *Held*, that E., the sister of the testatrix, took a life estate with a power of disposal of the real estate during her life, that the other beneficiaries took vested remainders subject to be divested if the power was exercised, and that the word "property" used to describe the residue meant whatever was left at the death of the tenant for life. *Reed* v. *Reed*, 216.

What Property is described.

10. In a devise of real estate on a city street "together with all the personal property connected therewith, consisting of horses, carriages carts furniture fixtures, the good will in the business all stock in trade — the same now used in part as a bakery and dwelling houses" the words "connected therewith" do not describe or include a claim against a corporation operating an elevated railway for damages to the real estate from the construction and operation of its railway in front of the premises. *Schell* v. *Schuler*, 441.

11. A testator devised to his son "all the real estate at 1354 and 1358

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Washington St. Boston, together with all the personal property connected therewith, consisting of horses, carriages carts furniture fixtures, the good will in the business all stock in trade — the same now used in part as a bakery and dwelling houses." When the testator made his will and at the time of his death he owned a chose in action consisting of a claim against the Boston Elevated Railway Company for damages to the above named property from the construction and operation of its elevated railway. The testator had other real estate which he devised for the benefit of two of his daughters. He directed that his son to whom he made the devise above quoted should pay to a third daughter of the testator $5,000 out of his "share above stated, which with the amounts that I have heretofore given her I believe is her fair share." The will contained no residuary clause. The inventory of the testator's estate showed that there was other property not disposed of by the will. *Held*, that the devise to the son of the testator did not include the claim for damages, which must be distributed as intestate property not disposed of by the will. *Schell* v. *Schuler*, 441.

Chose in Action.

Devise of real estate together with all personal property connected therewith and bakery business carried on there held not to include claim against Boston Elevated Railway Company for damages from construction and maintenance of elevated railway, see *ante*, 10, 11.

Perpetuities.

12. A testator made a bequest to his son of the income of a certain fund for life and "should he die leaving a widow and children" then during the life of his widow the income was to go in equal parts to the widow and children with a remainder over to the children in fee, "but if he should die leaving no issue but leaving a widow" then to his widow for life, with a remainder after the payment of certain legacies to the issue of the testator's son, or, failing such issue, to the testator's right heirs at law. The son died leaving no widow and no issue. *Held*, that the gift over to the testator's heirs was subject only to the life interest of the testator's son and conditioned on his dying leaving no issue, and was not void for remoteness. *Brown* v. *Wright*, 540.

DIVORCE.

See MARRIAGE AND DIVORCE.

EASEMENT.

Landowner cannot acquire by prescription right to maintain nuisance, see NUISANCE, 1, 2.

Extent of public easement taken for highway, see BOSTON AND WORCESTER STREET RAILWAY COMPANY, 2.

Character and extent of certain private right of way, see WAY, 1, 2.

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ELECTION.

The erroneous choice of a remedy which does not exist is not an election which precludes the prosecution of an inconsistent rightful remedy. *Doucette* v. *Baldwin*, 131.

ELEVATED RAILWAY COMPANY.

Action against corporation operating elevated railway for injury to passenger due to overcrowding of station platform, see NEGLIGENCE, 47–54.

ELEVATOR.

Action by servant of tenant of building, injured by starting of freight elevator, involving rights of plaintiff as licensee and of person starting elevator as servant of subtenant, see NEGLIGENCE, 68.

EMERY WHEEL.

Action by workman in factory against manufacturer of emery wheel sold to workman's employer, which burst and injured plaintiff, see NEGLIGENCE, 74.

EMINENT DOMAIN.

Where street railway company changes grade of highway, acting under grant of location from selectmen of town, owner of land abutting on highway has no remedy in tort, and as to what remedy he may have, see STREET RAILWAY, 4.

Appropriation by right of eminent domain of easement for purpose of laying and maintaining sewer is proceeding *in rem* and existence of such easement is not breach of warranty of title against claims of all persons claiming by, through or under grantor, see DEED.

EMPLOYER'S LIABILITY.

Actions against employers for injuries to employees, see NEGLIGENCE, 1–31.

EQUITABLE RESTRICTIONS.

1. Where the owner of a tract of land makes deeds of different portions of it each containing the same restriction upon the lot conveyed, which is imposed as part of a general plan for the benefit of the several lots, the grantees are given an equitable right to enforce against each other the restriction made for their common benefit. *Evans* v. *Foss*, 513.
2. Where a restriction for the common benefit is imposed upon the grantees of all the lots in a large tract of land, the fact that in some parts of the tract other restrictions also are imposed does not show that the restriction common to all the deeds was not intended to apply alike to all. *Ibid.*
3. In a suit in equity to enforce a restriction on land imposed for the protection of the surrounding lots for residential purposes it is no reason for refusing to enforce the restriction that in the opinion of the judge who

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hears the case the land in ten years "will be wanted for business purposes, and is worth more for such purposes than for residential purposes," if since the restriction was imposed there has been no material change in the conditions directly affecting the character and use of the property in question. *Evans* v. *Foss*, 513.

4. The erection of a garage designed to accommodate about one hundred and twenty automobiles of the larger type, having under it a steel tank arranged to hold ten barrels of gasoline, and containing a repair shop one hundred feet by thirty feet, with a small portable forge in one corner, where from six to eight cars of the largest type can be repaired simultaneously, the building being intended to be used as a salesroom, repair shop and repository for a company manufacturing automobiles, with demonstrators to run cars for possible purchasers, and also being intended to be used to store and care for automobiles belonging to about seventy-five or one hundred customers whose automobiles would go in and out on an average once each day, can be found to be a violation of a restriction, imposed on the land on which it is being constructed, that no building erected thereon shall "be used or occupied for a stable, either livery or public or private, for carpenter's shops, white or blacksmith shops, or for any foundry, mechanical or manufacturing purposes or for any other business which shall be offensive to the neighborhood for dwelling houses," especially where there is much evidence tending to show that the business proposed to be carried on would be "offensive to the neighborhood for dwelling houses." *Ibid.*

5. In order that an owner of land should be bound by restrictions, not contained in his deed or in those of his predecessors in title, which were imposed on other lots by a former owner of his land, it is necessary to show that when he bought the land he had notice of the restrictions and also to show that none of his predecessors in title since the restrictions existed bought without notice of them so as to convey a title free from restrictions. *Roak* v. *Davis*, 481.

6. Where a landowner, selling lots according to a plan which shows twenty-two lots adjoining and opposite each other on a certain street but contains nothing indicating restrictions, conveys four of the lots by deeds containing certain like restrictions, and gives another deed and a mortgage, and his successor in title gives a deed, containing restrictions which are similar to the former ones but differ in details, these conveyances do not show the adoption of a general scheme for the lots on the street shown on the plan which prevents the conveyance of the remaining lots on any terms which seem desirable to the owner, and it is immaterial whether or not purchasers of the remaining lots who take deeds without restrictions have notice of the restrictions in the deeds previously made. *Ibid.*

EQUITY JURISDICTION.

Small Claims.

1. The smallness of a claim is a proper ground for refusing to enforce it in equity. *Giragosian* v. *Chutjian*, 504.

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Intervenors.

Intervening holders of mechanics' liens allowed priority over diligent creditor who by attending foreclosure sale prevented sacrifice of assets, see *post*, 2.

Diligent Creditor.

Creditor who by diligence in attending foreclosure sale prevented sacrifice of assets postponed for benefit of intervening holders of mechanics' liens whose claims exhausted surplus after sale, see *post*, 2.

Accounting.

Bill in equity by one against his former partner to restrain interference with good will sold to plaintiff by defendant and for accounting by defendant for damage to plaintiff from defendant's acts of interference, see *post*, 3.

Fraud.

Suit in equity to compel cancellation of shares in corporation issued by majority of directors to obtain control of majority of shares, see CORPORATION, 10.

Mistake.

If one has purchased business under contract in writing based on erroneous computation of its value, he cannot maintain action for money had and received, but his remedy if any is in equity to reform or set aside contract, see CONTRACT, 7.

Creditor's Bill.

2. In a suit in equity by a judgment creditor under the general equity jurisdiction of the court to have his claim satisfied out of the surplus realized from a foreclosure sale of mortgaged real estate of the debtor after satisfaction of the mortgage, in which the holders of mechanics' liens upon the real estate had intervened as claimants, it appeared that the surplus was created by the diligence of the plaintiff in attending the foreclosure sale and preventing a sale of the property for the amount of the mortgage debt, that the mechanics' liens held by the claimants were founded on contracts made before the plaintiff's attachment in the action in which his judgment was obtained but after the making of the mortgage, that under the petitions of the claimants to enforce their mechanics' liens the amounts respectively due to them had been determined, but that no decrees had been made ordering the sale of the property, because it had been sold under the mortgage. It also appeared that the total amount of the mechanics' liens exceeded the amount of the surplus. *Held*, that the holders of the mechanics' liens had not lost their rights by failing to obtain a useless order of sale, and that the plaintiff could obtain no benefit from his diligence which had created the surplus for the benefit of the holders of the liens, although the court in its discretion properly could award him costs and counsel fees out of the fund. *Maguire* v. *Spaulding*, 601.

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Specific Performance.

Suit in equity for specific performance of agreement in writing to convey land, where, although provision fixing time within which option to purchase land might be accepted was of essence of contract, provision stating time after acceptance within which deed must be delivered was not of such essence, see CONTRACT, 17.

Facts warranting finding, in suit in equity for specific performance of agreement in writing to convey land, that there was sufficient offer of performance on part of plaintiff to maintain bill, see CONTRACT, 18; and there being things to be performed by plaintiff which could not be performed until plaintiff had acquired title to land, decree ordered that obligation to perform such things should be inserted in deed as agreements rather than as conditions subsequent, see EQUITY PLEADING AND PRACTICE, 2.

To enforce Negative Contract.

3. If a partner in a firm engaged in a long established book trade, with a department for the sale of books used in and in connection with the Episcopal church, which is under his immediate personal control and direction, sells and assigns to his only partner all his interest in the business and its assets including all his interest in the good will of the business, and thereafter organizes a corporation bearing his name, which in the same city not far from the old place of business carries on a book selling business established principally to sell church books to persons of the Episcopal church, the partner who purchased the good will, or his assignee, may maintain a suit in equity against the partner who sold it and the corporation he has organized, to restrain the individual defendant from working for or holding stock in or being connected with the corporation and for an accounting for the damages which the plaintiff has suffered from that defendant's breach of his contract, and to enjoin the corporation from employing the individual defendant in its business or recognizing him as a stockholder except to permit him to sell his shares of stock or to receive what is due upon them on the winding up of the corporation. *Old Corner Book Store* v. *Upham*, 101.

To restrain Unlawful Interference with Contract.

Bill in equity to restrain members of labor union and corporation for which plaintiff was doing work under contract from unlawfully conspiring to compel plaintiff to employ only union men in work and from interfering with him in performance of contract to do such work, see UNLAWFUL INTERFERENCE, 1–3.

To establish Equitable Mortgage.

4. In a suit in equity to establish an equitable mortgage the plaintiff may show by oral evidence that a deed absolute on its face was given as security and was intended as a mortgage, and there is nothing in the statute of frauds which prevents this. *Jennings* v. *Demmon*, 108.

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To relieve against Forfeiture.

Relief may be given in equity against forfeiture of title to land on failure to perform condition, on compensation being made within reasonable time, see CONTRACT, 19.

To enforce Restriction on Land.

Bill in equity to enforce restriction against using land for purposes "offensive to the neighborhood for dwelling houses," use proposed being for garage, see EQUITABLE RESTRICTIONS, 1–4.

Bill in equity to enforce restrictions contained in various deeds from a common owner of land and alleged to have been imposed acccording to general scheme applying to all lots shown on plan, see EQUITABLE RESTRICTIONS, 5, 6.

To enjoin Obstruction of Private Way.

Suit by one abutter on private way against another to enjoin obstruction of way with carts, sleds and other chattels, way having been created by predecessor in title of plaintiff and defendant, and they both having taken title subject to it, see WAY, 1, 2.

To enjoin Unlawful Use of Trade Name.

5. In a suit in equity by one doing business under the name "Oriental Process Rug Renovating Company," to enjoin an alleged interference with his rights in the use of this designation as a trade name, it appeared that about the time the plaintiff began to use this name the defendant began to carry on a business similar to that of the plaintiff under the name "Oriental Rug and Carpet Renovating Works," that when the defendant adopted this name the plaintiff had acquired no rights in his own trade name, and the defendant adopted the name in good faith without any intention of acquiring the plaintiff's business or of palming off his own business as that of the plaintiff, that neither the plaintiff nor the defendant used any process for cleaning or repairing rugs which was peculiar to himself, that each was familiar with and used the processes common in Oriental countries, so far as there were any such peculiar processes, and that each did as good work as the other. *Held*, that there was no ground for granting an injunction. *Giragosian* v. *Chutjian*, 504.

6. Where an injunction was granted to one carrying on business under the name "Oriental Process Rug Renovating Company," to restrain the defendant, who carried on business under the name "Oriental Rug and Carpet Renovating Works," from changing the order of the words of this name to "Oriental Carpet and Rug Renovating Works," so that it would appear alphabetically in the telephone directory before the trade name of the plaintiff, the justice who granted the injunction found that the damage to the plaintiff from the defendant's wrongful conduct had not been more than a very few dollars, and that the plaintiff had not sustained damage enough to warrant the reference of the case to a master, and in the decree granting the injunction ordered costs for the plaintiff but no

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damages. *Held*, that the decree was a proper one, a court of equity not being bound to send a case to a master where it is manifest that the damages are so small that they would be exceeded by the cost of the hearing. *Giragosian* v. *Chutjian*, 504.

To enjoin Conspiracy.

Bill in equity to restrain members of labor union and corporation for which plaintiff was doing work under contract from unlawfully conspiring to compel plaintiff to employ only union men in work and from interfering with him in performance of contract to do such work, see UNLAWFUL INTERFERENCE, 1–3.

Equitable Replevin.

7. A wife by placing personal chattels belonging to her in the possession of her husband who pledges them to one advancing money on them in good faith is not estopped to assert her title to the chattels, and can maintain a suit of equitable replevin against the pledgee to recover possession of them. *Kershaw* v. *Merritt*, 113.

8. In a suit of equitable replevin by a wife to recover possession of certain chattels pledged to the defendant by the plaintiff's husband and alleged to belong to the plaintiff, a master ruled that the plaintiff could maintain her bill and was entitled to recover possession of the chattels, and found that the plaintiff had no actual knowledge at the time of her husband's pledging the chattels to the defendant, that she never expressly authorized her husband to pledge them, and never expressly assented to or ratified the pledge after it had been made. He added "But if such knowledge, assent and ratification can be implied in law from the agency of her husband and her own acts as herein reported, then I find that she cannot maintain her bill." Facts were stated in the master's report which would have warranted a finding that the plaintiff in fact knew of the pledge of her property by her husband and either consented to it originally or afterwards ratified it. *Held*, that the meaning of the sentence quoted from the master's report was that the bill could not be maintained if the plaintiff's knowledge was to be implied as matter of law, and that it did not mean that she could not maintain her bill if her knowledge as matter of law could be implied in fact, and a decree for the plaintiff made by the Superior Court upon the master's report was affirmed by this court. *Ibid.*

To cancel Corporate Shares wrongfully issued.

Suit in equity to compel cancellation of shares in corporation wrongfully issued by majority of directors to obtain control of majority of shares, see CORPORATION, 10.

To enforce Statutory Liability of Directors of Street Railway Company.

9. The liability of the directors of a street railway company under R. L. c. 112, § 19, now St. 1906, c. 463, Part III. § 29, to the extent of its capital stock, for all its debts and contracts until the whole amount of its capital stock has been paid in and a certificate stating the amount fixed

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and paid in has been filed, can be enforced only in equity. *Westinghouse Electric & Manuf. Co.* v. *Reed*, 590.

10. In a suit in equity to enforce the liability of the directors of a street railway company under R. L. c. 112, § 19, now St. 1906, c. 463, Part III. § 29, to the extent of its capital stock, for all its debts and contracts until the whole amount of its capital stock has been paid in and a certificate stating the amount fixed and paid in has been filed, it is not necessary to make the corporation a party. *Ibid.*

11. Creditors of a street railway company before bringing a suit in equity to enforce the liability of the directors of the company under R. L. c. 112, § 19, now St. 1906, c. 463, Part III. § 29, to the extent of its capital stock, for all its debts and contracts until the whole of its capital stock has been paid in and a certificate stating the amount fixed and paid in has been filed, need not exhaust their remedy against the corporation by taking out execution or otherwise. *Ibid.*

12. In a bill in equity to enforce the liability of the directors of a street railway company under R. L. c. 112, § 19, now St. 1906, c. 463, Part III. § 29, to the extent of its capital stock, for all its debts and contracts until the whole amount of its capital stock has been paid in and a certificate stating the amount fixed and paid in has been filed, an averment, that the whole amount of the capital stock "was never actually paid in in cash" and "that no valid certificate has been filed by the directors of said street railway company to the effect that said capital stock has been paid in as required" by the statute, is not bad on demurrer in failing to state that no certificate has been filed, because the filing of a false certificate would not end the defendant's liability. *Ibid.*

13. The provision of St. 1903, c. 437, § 36, that a stockholder or officer in a corporation shall not be held liable for its debts or contracts unless it has been adjudicated bankrupt or a judgment has been recovered against it which it has neglected to pay, has no application to a suit in equity to enforce the liability of the directors of a street railway company under R. L. c. 112, § 19, now St. 1906, c. 463, Part III. § 29, to the extent of its capital stock, for all its debts and contracts until the whole amount of its capital stock has been paid in and a certificate stating the amount fixed and paid in has been filed. *Ibid.*

14. Under R. L. c. 112, § 19, now St. 1906, c. 463, Part III. § 29, making the directors of a street railway company jointly and severally liable, to the extent of its capital stock, for all its debts and contracts until the whole amount of its capital stock shall have been paid in, and a certificate stating the amount thereof fixed and paid in shall have been signed and sworn to by its president, treasurer, clerk and a majority of the directors, and filed in the office of the secretary of the Commonwealth, if the whole amount of the capital stock never has been paid in, the filing of a certificate by the directors and officers named in the statute falsely stating that the whole amount of the capital stock has been paid in does not stop the liability of the directors under the statute, and it is immaterial whether or not the directors acted in good faith in making the certificate. *Ibid.*

15. In a suit in equity brought by a judgment creditor of a street railway company under R. L. c. 112, § 19, to enforce the liability of the directors

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of the company, to the extent of its capital stock, for its debts and contracts until the whole amount of its capital stock has been paid in and a certificate stating the amount fixed and paid in has been filed, where the railway company is insolvent, and the company itself and receivers of its property appointed by the Circuit Court of the United States are made defendants, and the receivers appear and file an answer submitting themselves to the jurisdiction of the court, the court of the Commonwealth in which the suit was brought has jurisdiction of it although it does not appear that the suit was authorized by the court which appointed the receivers, the corporation not being a necessary party to the suit, and the liability of the directors sought to be enforced being no property or right of the corporation to which the receivers would be entitled. *American Steel & Wire Co.* v. *Bearse*, 596.

Trust.

16. Although this court has no jurisdiction as a court in equity to compel a probate accounting, yet, where a trust fund created by a will has been diverted from the possession and control of the trustee and has passed into the hands of a devisee of one of the *cestuis que trust*, parties claiming the whole or parts of the fund as against each other may come into equity to secure the preservation of the fund and to have their respective rights determined, leaving the final accounting to be had and the net amount of the trust fund to be determined in the Probate Court. *Holmes* v. *Holmes*, 552.

17. Where under the provisions of a will one of the beneficiaries of a trust has a right to receive one third of the fund in the hands of the trustee at a certain date, and two or three weeks before this date the trustee conveys and transfers to this beneficiary the whole of the fund without authority to do so, the beneficiary and those holding under him should not be compelled to return the third of the fund to which he rightfully is entitled merely because it was conveyed to him prematurely and because other property to which he is not entitled was conveyed with it. *Ibid.*

Bill in equity to establish trust against administrator of one alleged to have received legacy absolutely intended to have been given him in trust and afterward orally to have promised father of plaintiffs to hold property in trust, held not maintainable, see TRUST, 1, 2.

Transfer of savings bank accounts by owner to himself as trustee for persons named as beneficiaries, retaining possession and control of books, does not create trust, see TRUST, 3.

For Assessment of Damages.

In suit to enjoin unlawful use of trade name, court will not refer case to master for assessment of damages if damages would be less in amount than cost of hearing, see *ante*, 1, 6.

EQUITY PLEADING AND PRACTICE.

Parties.

Corporation is not necessary party to bill in equity to enforce liability of directors of street railway company under R. L. c. 112, § 19, see EQUITY JURISDICTION, 10, 15.

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Service of Process.

Provision in St. 1902, c. 349, as to service of process upon foreign corporation by leaving copy of petition at place where business is carried on, in matter of petition by collector of taxes of city against such corporation, delinquent in payment of tax, is reasonable and valid and was not superseded or repealed by provisions of St. 1903, c. 437, see CORPORATION, 3.

Bill.

1. In a suit in equity by a street railway company to compel the specific performance of a contract to convey to the plaintiff a strip of land on the proposed location of its railway, a copy of a contract in writing for an option to purchase the land, accepted by the plaintiff, was annexed to the bill and made a part of it. Annexed to the answer was a copy of another instrument in writing which the defendant alleged to be a part of the contract between the parties. A master found that the two instruments were delivered at the same time and together constituted the contract of option between the parties. The bill originally contained the following averment: "The plaintiff is ready and willing and hereby offers to pay to the defendant said sum of $500 and to comply with any and all other terms of said agreement on its part to be performed." The plaintiff was allowed to amend by adding to this averment the words "and any and all terms of the paper, a copy whereof is annexed to the defendant's answer, to such extent and in such manner as the court may require." The defendant objected that the contract, which was made up of the two papers, was not set forth in the bill fully and formally. *Held*, that, while it would have been more regular, in making the amendment, to include the contents of the additional paper with the formal statement of the other part of the contract, the reference to the paper annexed to the defendant's answer and the offer to perform the contract according to its terms should be treated as an embodiment of the contents of the paper in the contract set forth in the bill, and that the bill as amended contained a sufficient statement to protect the rights of the parties. *Boston & Worcester Street Railway* v. *Rose*, 142.

Ruling refusing to allow decree going beyond scope of bill, see UNLAWFUL INTERFERENCE, 3.

Averments of bill in equity to enforce liability of directors of street railway company under R. L. c. 112, § 19, held sufficient, see EQUITY JURISDICTION, 12.

Amendment.

On appeal from decree in equity where whole case is before this court on report of all evidence without special findings of fact, this court in exercise of its discretion may order any amendments necessary to meet case presented on evidence, see *post*, 7.

Where, in answer to bill in equity for specific performance of agreement in writing set forth in bill, defendant sets forth further writing alleged to be part of agreement, and plaintiff in amending adds allegation that it

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has performed all conditions precedent contained both in writing annexed to bill and that annexed to answer, while it would be more formal to add writing set forth in answer to stating part of bill, defect in omitting to do so is not material, see *ante*, 1.

Master's Report.

Interpretation of meaning of master's report on appeal from decree confirming it, where master made finding that wife, seeking equitable replevin of chattels belonging to her and pledged by her husband, had never expressly authorized or assented to or ratified such act of her husband, and allowed prayer of bill, and added, "but if such knowledge, assent and ratification can be implied in law from the agency of her husband and her own acts as herein reported, then I find that she cannot maintain her bill," and reported facts from which finding could have been made that wife either originally knew of or consented to or ratified husband's act, see EQUITY JURISDICTION, 8.

Memorandum of Findings.

Memorandum of findings of judge who heard equity suit, where evidence was taken by commissioner, is part of record, see *post*, 5.

Decree.

2. In a suit in equity by a street railway company to compel the specific performance of a contract to convey to the plaintiff a strip of land on the proposed location of its railway, where under the contract proved it was the duty of the defendant to prepare and deliver a deed and the plaintiff was to pay a sum of money and to do certain things upon the land which could not be done until it acquired title to it, and where there was no requirement in the contract that the performance of the plaintiff's agreements should be made conditions subsequent in the deed, the court in ordering a conveyance of the land were of opinion that the rights of the defendant could be secured properly by inserting in the deed agreements which would be binding on the grantee and its successors and assigns, instead of by inserting conditions, the breach of which at any time would work a forfeiture. *Boston & Worcester Street Railway* v. *Rose*, 142.
3. In a suit in equity by the heirs by blood of a certain person against his widow and the trustee under the will of his father, seeking to compel the widow to return to the trustee a certain trust fund the whole of which was conveyed and transferred to her by the trustee, if it appears that the widow is entitled to two thirds of the fund and that the plaintiffs are entitled to the other third of it, the court will order a decree to be entered declaring the rights of the parties, and, if the plaintiffs desire it, ordering the widow to convey and transfer to the trustee a sufficient part of the fund to enable him to account in the Probate Court and to pay and convey to the plaintiffs the share to which they are entitled, but the court will not require the widow to reconvey the whole of the fund to the trus-

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tee in order that he may return to her two thirds of it after deducting necessary expenses. *Holmes* v. *Holmes*, 552.

Ruling refusing prayer for decree beyond scope of bill, see UNLAWFUL INTERFERENCE, 3.

Decree dismissing bill in equity without costs may be modified on appeal so as to include costs of appeal, see *post*, 8.

Exceptions.

4. The principle of Common Law Rule 45 of the Superior Court, formerly Rule 48, providing that, except as there provided, no exception shall be allowed unless alleged and saved at the time when the opinion, ruling, direction, or judgment excepted to is given, should be applied to orders in equity proceedings, especially where the suit in equity is for the purpose of establishing a debt to the plaintiff from the principal defendant and is in substance an action at law. *Graves* v. *Hicks*, 524.

Appeal.

5. On an appeal in equity, where the evidence has been taken by a commissioner, a memorandum of findings of fact filed by the justice who heard the case is a part of the record and such findings will not be set aside unless they are plainly wrong. *Elliott* v. *Baker*, 518.

6. On an appeal from a decree in equity where all the evidence is reported and the evidence, which was in large part oral, is conflicting, the decision of the judge who heard the witnesses will not be set aside if there is evidence on which his finding is warranted. *Jennings* v. *Demmon*, 108.

7. On an appeal from a decree in equity where the whole case is before this court on a report of all the evidence without special findings of fact, the case is to be disposed of as it should have been disposed of by the judge who heard the evidence, except so far as the general finding of the judge after seeing the witnesses affects the case, and it is competent for the parties to put forward in this court contentions justified by the evidence which were not presented below. Moreover this court in the exercise of its discretion may order any amendments to be made in the pleadings which are necessary to meet the case presented on the evidence. *Old Corner Book Store* v. *Upham*, 101.

8. On an appeal from a decree in equity ordering that the bill be dismissed without costs, this court in affirming the decree ordered that before such affirmation it be modified so as to include the costs of the appeal. *Jennings* v. *Demmon*, 108.

9. Where in a suit in equity there is a motion for a new trial, which is denied by the judge, and the party who made the motion appeals from the order and afterwards attempts to file an exception, which cannot be allowed because it was not taken at the time when the order was made, and the same party later appeals from a final decree against him, but the record of the appeal does not set out enough of the proceedings to enable this court to say upon what ground the judge denied the motion for a new trial, the appeal from the final decree brings the appeal from the inter-

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locutory decree denying the motion before this court but discloses no reason for sustaining it. *Graves* v. *Hicks*, 524.

Costs and Counsel Fees.

10. In a suit in equity by a trustee under a will for instructions as to the distribution of a fund, where costs as between solicitor and client are allowed to the parties out of the fund, if nephews and nieces of the testator and children of deceased nephews and nieces whose interests are identical choose to be represented by four different counsel, only one set of costs should be allowed to them all. *Brown* v. *Wright*, 540.

Costs of appeal may be ordered in this court on appeal from decree in equity that bill be dismissed without costs, see *ante*, 8.

Costs and counsel fees allowed to diligent plaintiff in creditor's bill to be paid out of fund, plaintiff being deprived of further share in fund by award to intervening holders of prior mechanics' liens, who have profited by his diligence, see EQUITY JURISDICTION, 2.

ESTOPPEL.

If a person, erroneously supposing that he has a claim against the estate of a bankrupt, proves his alleged claim in bankruptcy, this does not estop him from asserting that the whole fund and property involved in the claim belong to him and not to the trustee in bankruptcy. *Doucette* v. *Baldwin*, 131.

Erroneous choice of remedy which does not exist is not election which precludes prosecution of inconsistent rightful remedy, see ELECTION.

Wife is not estopped to assert her title to chattels in possession of and pledged by her husband to one advancing money on them in good faith, see EQUITY JURISDICTION, 7.

Executors are estopped from contending that tax should have been assessed to them as trustees where they have paid tax under protest as executors and it is upon a debt acknowledged by them as executors under seal to be due them as executors, see TAX, 3.

EVIDENCE.

Judicial Notice.

1. This court takes judicial notice of special acts of incorporation, which R. L. c. 175, § 72, requires shall be held to be public acts. *American Steel & Wire Co.* v. *Bearse*, 596.

Admissions and Confessions.

As to admissibility and effect at trial for bribery of confession by defendant where such confession is and where it is not corroborated by other evidence, see PRACTICE, CRIMINAL, 1, 2.

Questions in cross-examination of plaintiff in action for damages to real

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estate tending to elicit admission as to damages previously claimed by him from different person but for same loss of rental values, see WITNESS, 1.

Evidence of extension of platform made by elevated railway company after accident, which plaintiff contends should have been done before accident, admitted, not as admission of negligence, but to disprove statement of defendant's chief inspector that such extension was impracticable, see NEGLIGENCE, 52.

Presumptions and Burden of Proof.

Cases involving application of doctrine of *res ipsa loquitur*, see NEGLIGENCE, 9, 16, 34, 75.

Acts of public official are presumed to have been done rightly until contrary is shown, see MUNICIPAL CORPORATIONS, 2.

At trial where there is oral evidence and auditor's report, latter, although *prima facie* evidence, does not affect burden of proof, see PRACTICE, CIVIL, 4.

Question whether burden of proving defence that instrument under seal was made void by material alteration is on defendant, see BOND, 4.

In action on promissory note, where consideration is denied by defendant, although production of note in ordinary form is *prima facie* evidence of consideration burden of proving consideration is still on plaintiff, see BILLS AND NOTES, 1.

Action not maintainable against street railway company for injury of conductor by sudden starting of electric car, if cause of starting is wholly matter of conjecture and accident might have happened without negligence of defendant, see NEGLIGENCE, 20.

Fact that chain which in good condition would sustain load of thirty-five hundred pounds broke under load of eighteen hundred pounds when there was no sudden or unusual strain upon it warrants finding that it was defective, see NEGLIGENCE, 16.

Rule of law in this Commonwealth that there is presumption of fact that promissory note given by debtor to creditor for whole or part of indebtedness is received by creditor in payment applies even where creditor is in State where rule of law is otherwise and accepts note there, if note is payable in this Commonwealth and was given for goods delivered here, see PAYMENT, 1, 2.

Res ipsa loquitur.

See NEGLIGENCE, 9, 16, 34, 75.

Declarations of Deceased Persons.

2. Where a letter of a deceased person contains statements which under R. L. c. 175, § 66, are admissible in evidence for the purpose of contradicting the material testimony of a witness, the fact that the letter also contains irrelevant matter does not make the relevant portion of it inadmissible. *Randall* v. *Claflin*, 560.

3. At the trial of an action at common law by an administratrix against a street railway company to recover for personal injuries of the plaintiff's intestate resulting in his death caused by the alleged negligence of the

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defendant's servants, the declarations of the intestate describing the accident are admissible under R. L. c. 175, § 66, although the defendant thus is deprived of the advantage of a cross-examination by which to test the accuracy of the statements or to obtain admissions in support of its own theory of the accident. *Chaput* v. *Haverhill, Georgetown & Danvers Street Railway*, 218.

Opinion: Experts.

4. An ordinary observer may testify as to his conclusions of fact at the time of his observation in regard to a condition of things which can be understood by men in general and which cannot be reproduced before the jury as it appeared to the witness. *Beverley* v. *Boston Elevated Railway*, 450.

Opinion of superintendent of wires of city as to what duties are imposed on him by by-laws and ordinances is not admissible to prove what those duties are, see MUNICIPAL CORPORATIONS, 5.

Circumstantial.

Proof of liability of insurer under policy of accident insurance requiring proof of death by drowning to be by testimony of eye witness held to be sufficient if eye witness saw circumstances sufficient to warrant inference that drowning occurred, see INSURANCE, 5.

Extrinsic affecting Writings.

5. In an action to recover the contract price for drilling an artesian well under a contract in writing to procure "twenty-five gallons of water per minute," the defendant may show by oral evidence that the word "water" meant fresh water suitable for drinking and for other purposes for which salt water could not be used. *Smith* v. *Vose & Sons Piano Co.* 193.

6. In an action on an agreement in writing to recover the contract price for drilling an artesian well for a corporation engaged in the manufacture of pianos, it appeared that by the contract the plaintiff undertook "to procure water in the earth above the bed rock" on the defendant's premises by driving in the boiler room of the factory a pipe two and one half inches in diameter, but if a sufficient amount was not obtained then to "drill a well not less than six inches in diameter in the bed rock . . . until twenty-five gallons of water per minute is obtained." The plaintiff drilled a well which finally produced this volume of water but the water was very salt and unsuitable for use in the defendant's business. The plaintiff contended that he had performed his contract. The defendant offered to show by oral evidence that during the preliminary negotiations which resulted in the contract the plaintiff was informed by the defendant that its object in driving the well was to obtain a supply of water to be drunk by its workmen and to be used for other purposes in the defendant's factory for which salt water could not be used, that the defendant also informed the plaintiff that it could not use salt water for anything, and that if salt water was wanted it could be obtained within a few feet of the surface by an ordinary duplex pump, that the plaintiff agreed to furnish

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water as good as the water produced by a well dug by the plaintiff for a certain brewing company which the defendant had tested and knew to be good. The evidence was excluded by the judge against the exception of the defendant, and a verdict was returned for the plaintiff. *Held*, that the exclusion of the evidence was wrong, and that the defendant was entitled to a new trial, the evidence being admissible to show the meaning of the word "water" as used in the contract in writing. *Smith* v. *Vose & Sons Piano Co.* 198.

7. A grantor of land, who has covenanted in the deed that the premises are free from incumbrances made or suffered by him and has warranted against such incumbrances, cannot maintain an action on an oral promise of the grantee to pay as a part of the consideration a tax assessed to the grantor as of the first day of May preceding the conveyance. Dictum in Preble *v.* Baldwin, 6 Cush. 549, disapproved and a part of the doctrine of that case declared to have been modified by later cases. *Edison Electric Illuminating Co.* v. *Gibby Foundry Co.* 258.

Party to contract of sale in writing cannot contradict it as to price to be paid, see CONTRACT, 1.

Deed of conveyance of land, absolute on its face, may be shown to have been given as security and intended as mortgage, see EQUITY JURISDICTION, 4.

Evidence of obstruction for over forty years of one half of private way by abutter thereon is inadmissible to vary terms of unambiguous deed granting use of way to all abutters thereon, see WAY, 1.

Hearsay.

Statements of trustee in trustee process in answer to interrogatories propounded to him by plaintiff are not objectionable as hearsay at trial of issues between plaintiff and claimant under R. L. c. 189, § 32, see TRUSTEE PROCESS, 1, 2.

Corroborative.

Evidence held to corroborate confession of defendant under indictment for bribery, see PRACTICE, CRIMINAL, 2.

Remoteness.

In action against city for injury from defect in highway, evidence of other accidents at same point in highway held rightly excluded, see WAY, 3.

In action for injury from being struck on head by iron buffer held by bolt falling from machine plaintiff may show condition of bolt immediately after accident, see NEGLIGENCE, 10.

Self serving Acts.

Certain self serving acts held admissible as evidence in action against city for rent of wharf, see LANDLORD AND TENANT, 7.

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Res inter alios.

Statements of trustee in trustee process in answer to interrogatories propounded to him by plaintiff held not to be *res inter alios* at trial of issues between plaintiff and claimant under R. L. c. 189, § 34, see TRUSTEE PROCESS, 1, 2.

As to Credibility of Witness.

Questions in cross-examination held admissible as testing credibility of witness, see WITNESS, 1, 2.

Matter of Common Knowledge.

Plaintiff allowed to inquire of defendant's employee as to matter, perhaps of common knowledge, which if not so was admissible, see NEGLIGENCE, 51, 52.

Of Application for Insurance.

Admission in evidence of part of application for insurance offered by insurer to show representations made by insured which insurer contended to be false held correct, the part offered being only part annexed to policy and remaining part not affecting right of insurer to avoid contract, see INSURANCE, 7.

Of Custom.

On question of due care of lineman of telephone company who was struck by passing street car while at work on pole, evidence that it was customary for men on ground to warn man on pole of approaching car, held admissible, see NEGLIGENCE, 43.

Custom of superintendant of wires not to issue permits for extension of electric wires under certain circumstances held not admissible in evidence to excuse plaintiff for failing to procure such permit, see NEGLIGENCE, 66, 67.

Of Occupation.

Certain acts showing occupation by defendant held admissible in action against city for rent of wharf, see LANDLORD AND TENANT, 7.

Of Operation of Mind.

Answer of plaintiff held admissible as showing his state of mind at time of choosing to do certain action contended by defendant to be negligent, see NEGLIGENCE, 44.

Photographs.

8. The preliminary finding of a trial judge as to the sufficiency of the verification of a photograph for the purpose of admitting it in evidence is final. *McKarren* v. *Boston & Northern Street Railway*, 179.

9. In an action for personal injuries photographs of the injured portion of the plaintiff's person may be admitted in evidence without calling the photographer as a witness, if they are found by the presiding judge to be

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verified by the testimony of a medical expert who testifies that the photographs were taken in his presence and under his direction. *McKarren v. Boston & Northern Street Railway*, 179.

10. In an action for personal injuries photographs of the injured portion of the plaintiff's person, properly verified and admitted in evidence, which were taken in the presence and under the direction of the physician who attended the plaintiff and are used by the physician in describing as a witness the nature and extent of the plaintiff's injuries, must be considered as forming a part of the physician's testimony. *Ibid.*

In Rebuttal.

Exception to admission of evidence in rebuttal cannot be sustained unless excepting party shows that its admission was not merely as matter of discretion, see PRACTICE, CIVIL, 6.

Relevancy and Materiality.

Material part of letter containing statement on material matter, which is admissible in evidence as declaration of deceased person under R. L. c. 175, § 66, is not rendered inadmissible because letter also contains irrelevant matter, see *ante*, 2.

Questions of immateriality and materiality of various matters of evidence offered at trial of action against Boston Elevated Railway Company brought by one injured because of overcrowding of platform of station see NEGLIGENCE, 47–54.

In action under employers' liability act, where it does not appear that there was not sufficient number of ropes for certain purpose, general question as to supply of ropes may be excluded, see NEGLIGENCE, 3.

In action by employee against her employer for injuries from stepping into a hole in the floor of the room in which she worked on the first day of her employment, it is immaterial whether before that day the hole was covered over or not, see NEGLIGENCE, 24.

In action where one question of fact was whether determination of defendant not to accept an option was communicated to treasurer of corporation, conversation between defendant and son of treasurer afterward communicated to treasurer is admissible in evidence, see CONTRACT, 15.

In action by lineman of telephone company against street railway company for injuries from being struck by passing car while he was on pole, evidence of flags near pole to give warning of sewer in process of construction held admissible to show condition of things at time of accident, see NEGLIGENCE, 42.

In action by one who made contract in writing with city and afterwards refused on certain day to go on with contract unless his construction of it, which turned out to be wrong, was adopted, contract in writing with another contractor for same work, dated day after plaintiff's refusal, is not admissible, see CONTRACT, 13.

On issue of negligence of one extending electric light wires in cellar under his shop in failing to procure permit from superintendent of wires in

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city, facts that it was custom of superintendent not to issue permits in cases such as that under consideration, and that he did not think it his duty to do so, are not material, see NEGLIGENCE, 65–67; MUNICIPAL CORPORATIONS, 5.

EXECUTOR AND ADMINISTRATOR.

Accounts.

1. Since the enactment of R. L. c. 150, § 19, which was passed for the purpose of giving the Probate Court power to protect an executor or administrator in paying legacies or distributive shares by a decree of distribution, the allowance of the accounts of an executor or administrator stating such payment in the settlement of an estate has the effect of a decree of distribution under the statute. *Libby* v. *Todd*, 507.

Taxation of Funds of Estate.

Executors are estopped from contending that tax should have been assessed to them as trustees where they have paid tax under protest as executors, and it is upon debt acknowledged by them as executors under seal to be due to them as executors, see TAX, 3.

Where executors of deceased member of partnership, one of terms of which was that on death of partner interest of such member should remain in business for two years, agree under seal as to amount of testator's interest, which still is used as capital of firm, such amount is taxable in hands of executors, see TAX, 2.

Petition for Retention of Funds.

2. On a petition to the Probate Court under Pub. Sts. c. 186, § 13 (now R. L. c. 141, § 18) to require the administrator of an estate to retain in his hands sufficient assets to satisfy a claim of the petitioner which "is or may become justly due" from the estate, the petitioner comes within the terms of the statute if he proves that he furnished the money for a joint venture of himself and the intestate on which there has been a loss, under an agreement by which the intestate was bound to pay the petitioner one half of the loss when ascertained, and that he is prosecuting a claim against a third person, whose liability is established, which when its amount is determined will diminish the amount of the deficiency, but probably will not extinguish it. *Peabody* v. *Allen*, 345.

Distribution.

3. An administrator who in good faith and without negligence makes a distribution of the estate of his intestate under and in accordance with a decree of the Probate Court will be protected from liability, although it afterwards appears that he distributed the estate to the wrong persons and the decree of distribution is revised accordingly. *Cleaveland* v. *Draper*, 118.

4. On a petition in the Probate Court for a decree of distribution of the

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estate of an intestate after the revocation of a former decree of the same court for the distribution of the same estate which declared that a certain person was the only person entitled to the balance of the estate, under which the whole balance of the estate was paid to him, if it appears that the petitioners are entitled to such balance of the estate and that the person to whom it was paid was not entitled to any of it, but that the administrator in good faith and without negligence made the payment under and in accordance with the previous decree of the Probate Court, afterwards revoked, the new decree of distribution should affirm the former decree except in correcting the error as to the persons entitled to receive the balance of the estate and should not require the administrator to take further action or impose upon him any liability. *Cleaveland* v. *Draper*, 118.

Effect of allowance of account of administrator showing payment of distributive shares, see *ante*, 1.

EXPRESS COMPANY.

Ordinance of city as to licensing wagons of express company conveying goods for hire from place to place within city held valid, see MUNICIPAL CORPORATIONS, 1.

FEEBLE-MINDED PERSON.

Infant paupers committed to and supported in School for Feeble-Minded are not insane persons, see INSANE PERSON.

FRATERNAL BENEFICIARY CORPORATION.

Agreement in certificate of fraternal accident insurance providing for reference to arbitration of questions of liability arising under other provisions of certificate is void, see INSURANCE, 3.

Rule against making death benefit payable to estate of insured does not apply where real beneficiaries are his heirs at law, see INSURANCE, 4.

Copy of application for insurance in fraternal beneficiary corporation referred to in certificate need not be annexed thereto as prerequisite to its being considered part of contract or being received in evidence, see INSURANCE, 6.

FRAUD.

In procuring execution of will, see WILL, 2–5.

Facts held not to show that acceptance as payment of promissory notes given by debtor to creditor was procured by fraud of debtor and therefore subject to rescission by creditor, see PAYMENT, 3.

FRAUDS, STATUTE OF.

There is nothing in statute of frauds to prevent assignee through mesne conveyances of grantor in deed absolute on its face from showing that it was

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given as security and was intended as mortgage, see EQUITY JURISDICTION, 4.

GARAGE.

Erection and maintenance of garage held to be violation of restriction on land against any use "offensive to the neighborhood for dwelling houses," see EQUITABLE RESTRICTIONS, 4.

GIFT.

Mere declaration of trust not communicated to donee and assented to by him is not sufficient to perfect trust in this Commonwealth, see TRUST, 1.

Where savings bank accounts are transferred by owner before his death to himself as trustee for beneficiaries named, there being no delivery of possession of books, and owner continues to draw interest on accounts for his own use until his death, persons named as beneficiaries acquire no title to accounts, see TRUST, 3.

GOOD WILL.

In this Commonwealth when a man voluntarily sells the good will of his business he thereby agrees not to set up a competing business which will derogate from the good will that he has sold, and the question whether a new business set up by him is in derogation of his sale is one of fact relating to the character of the business sold and of that set up. *Old Corner Book Store* v. *Upham*, 101.

Bill in equity maintained by one against his former partner to restrain interference with good will sold to plaintiff by defendant and for accounting by defendant for damages to plaintiff from defendant's acts of interference, see EQUITY JURISDICTION, 3.

GUARDIAN.

Guardian ad Litem.

It is possible that there may be a case in which it is the duty of a guardian *ad litem* to raise a question as to the right of his wards to receive certain property, although it is conceded by all the other parties in interest, on the ground that it is for the interest of his wards to have their rights settled rather than to have the property with a liability to refund it; but where the interest of the wards is a future one which may not vest for upwards of fifty years the remote possibility that his wards now unborn and unascertained may have to refund the property after having received it does not justify a guardian *ad litem* in raising and pressing a doubt as to the validity of a payment made by the administrator of an estate ultimately for the benefit of his wards by opposing the allowance of such payment in the administrator's account until the matter can be passed upon by the court. *Libby* v. *Todd*, 507.

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Deed of Land under License to Sell.

Construction of deed of land by guardian made in pursuance of sale under license of Probate Court with reference to whether land is bounded at side of private way or whether it includes way, see BOUNDARY, 2.

HIGHWAY.

See WAY, 3–7.

HUSBAND AND WIFE.

Wife not estopped to assert her title to chattels in possession of and pledged by her husband to one advancing money on them in good faith, and neither her assent to nor ratification of her husband's acts can be implied in law from implied agency of husband, see EQUITY JURISDICTION, 7, 8.

ICE AND SNOW.

Action by woman for injury from falling upon icy cross walk of public highway, where ice was due to accumulation of water caused by retaining wall and grading on land of defendant, see NUISANCE, 1–4.

INFANT.

If an infant, under an agreement by which he is to enter a partnership with two other persons when he has contributed a certain amount of money, deposits with one of these persons a sum of money less than the amount required, to be held by this person as a depositary until the full amount is paid, and if the infant never pays the full amount, the contract is executory and the infant may avoid it and recover the money he has deposited. *Dusopole* v. *Manos*, 355.

Acts of next friend of infant plaintiff with regard to agreement for judgment for plaintiff for reasonable sum fairly made, signed by next friend and filed in court held binding upon infant, see JUDGMENT, 2.

INSANE PERSON.

Infant paupers committed to and supported in the School for the Feeble-Minded are not insane persons within the meaning of R. L. c. 87, § 6, for whose support the Commonwealth must pay after January 1, 1904, under § 79 of the same chapter, and under § 120 of the same chapter the charges for such support can be recovered by the treasurer and receiver general from the city or town in which such feeble-minded paupers had a settlement. *Chapin* v. *Lowell*, 486.

INSURANCE.

Construction of Contract in General.

1. In construing doubtful provisions of a policy or certificate of insurance the insured is to be given the benefit of the doubt, and this rule is par-

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ticularly applicable where the contract of insurance incorporates numerous and complicated conditions. *Lewis* v. *Brotherhood Accident Co.* 1.

Accident.

Construction.

2. A policy or certificate of accident insurance was stated to cover drowning as well as bodily injuries produced by external, violent and accidental means, of which many were enumerated. There was also a provision that "In the event of any accidental bodily injury, fatal or non-fatal, contributed to or caused by" a large number of enumerated events, the limit of liability in case of death should be only one twentieth of the death benefit provided for in the policy. The event producing this reduction of liability in case of drowning was described as follows: "drowning or shooting when the facts and circumstances of the accident and injury are not established by the testimony of an actual eye witness; and also when in an alleged drowning (shipwrecks at sea excepted) the body is not recovered and identified;" followed, immediately after the semicolon, by the clause "and in case of injuries whether fatal or disabling of which there is no visible mark on the exterior of the body visible to the eye (the body itself in case of death not to be deemed such mark)." *Held*, that the last quoted provision, referring to external marks of contusions and wounds, applied only to the more violent causes of injury and not to the case of death by drowning; *also*, that the provision in regard to the testimony of an actual eye witness did not require that such eye witness should have seen the drowned person go under water, but that convincing circumstantial evidence of the drowning proved by eye witnesses of the circumstances was sufficient to comply with the requirement. *Whether*, such a requirement is void as an attempt to impose a rule of evidence upon the courts, was not considered. *Lewis* v. *Brotherhood Accident Co.* 1.

Invalidity of agreement for arbitration.

3. A policy of accident insurance, called a certificate, contained an express promise to pay a certain sum of money to the estate of the insured in case of his death from one of the causes named, and also contained an express promise to pay to the insured in case of injury certain sums varying with the extent of his injury. These promises were made subject to the by-laws of the company and the conditions attached to the policy which were numerous, and neither the by-laws nor the conditions contained any provision for arbitration. At the end of the policy, immediately before the attesting clause, was the following provision: "In the event that this company and the certificate holder or beneficiary disagree as to the liability of this company under this certificate, it is agreed, and this certificate is issued upon the express condition, that such liability and the amount thereof shall be determined by arbitration." Then followed a provision as to the persons of whom the board of arbitrators should consist. *Held*, that the provision quoted was an agreement to refer to arbitration questions of liability arising under other provisions of the contract, and was void as an attempt to oust the courts of their jurisdiction. *Ibid.*

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Real beneficiary.

4. The rule, that under the statutes relating to fraternal beneficiary corporations a certificate in such a corporation cannot be made payable to the estate of the insured and thus subject a death benefit to the payment of his debts, does not apply to a policy or certificate made payable to the estate of the insured "in trust however for and to be paid over forthwith to his legal heirs," as the real beneficiaries are the heirs at law and the money when recovered goes to them. *Lewis* v. *Brotherhood Accident Co.* 1.

Proof of drowning.

5. A requirement of a policy of accident insurance that in case of the death of the insured by accidental drowning, in order to recover the full amount of the policy, the facts and circumstances of the accident must be established by the testimony of an actual eye witness, is satisfied by evidence from eye witnesses that shortly before the accident the insured, who was a good boatman, was seen on a river with a young woman in a "cranky" canoe, which was likely to overturn at any moment unless unusual care was exercised both by the insured and his companion, and that in less than five minutes from the time at which they last were seen alive the canoe was overturned and their bodies were under water. *Ibid.*

Life.

Application.

6. The provision of St. 1893, c. 434, § 1, now R. L. c. 118, § 73, requiring a copy of the application of the insured referred to in a policy of life insurance to be annexed to the policy as a prerequisite to its being considered a part of the contract or being received in evidence, does not apply to a certificate of life insurance issued by a fraternal beneficiary corporation organized under St. 1899, c. 442, now R. L. c. 119. *Attorney General* v. *Colonial Life Association*, 527.

7. In an action on a policy of life insurance, where the defence was that certain representations made by the insured in his application for insurance were false and either were made fraudulently or were material to the risk and avoided the policy, the policy stated that it was issued "in consideration of the statements and agreements in the application herefor, which are hereby referred to, and as warranties made a part of this contract, and of the premium" named. The presiding judge under R. L. c. 118, § 73, admitted in evidence an application for insurance by the insured, containing the representations in question, of which a copy was attached to the policy, although a so called proposal for insurance upon the other side of the same paper was not included in the copy attached to the policy and was excluded by the judge. The portion of the contents of the paper of which the copy was annexed included the questions and answers attested by the medical examiner and the statement signed by the applicant that these questions and answers should form the basis and become a part of the contract of insurance, and all the material portions under the designation "proposal for insurance" on the other side of the paper were incorporated by repetition in the part called the "application,"

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of which the copy was annexed, except that the name of the beneficiary, a brother of the insured, appeared only in the "proposal for insurance." The terms of the policy and of the application gave the insured the right to change the beneficiary from time to time by a notice in writing subject to the approval of the company. *Held*, that, as the omission of the name of the beneficiary in no way affected the right of the company to avoid the contract, the ruling of the judge admitting the application in evidence as part of the contract was correct. *Langdeau* v. *John Hancock Ins. Co.* 56.

Fraud or misrepresentations of insured.

8. In an action on a policy of life insurance by an assignee from the beneficiary named in the policy, if the contract of insurance was obtained by misrepresentations of the insured made with actual intent to deceive or if a matter misrepresented by him increased the risk, the plaintiff under R. L. c. 118, § 21, cannot recover on the policy. *Ibid.*
9. In an action on a policy of life insurance where it appeared that in the application of which a copy was attached to the policy the insured represented that he never had been rejected for life insurance by the defendant or any other company, there was uncontroverted evidence that less than a month before his application to the defendant the insured had applied to another company for insurance and had been rejected, but there was no direct evidence that he had been informed of the rejection. *Held*, that it was a question for the jury whether under the circumstances disclosed by the evidence the insured should have drawn the inference that his proposal had been rejected. *Ibid.*
10. In an action on a policy of life insurance it appeared that in the application of which a copy was attached to the policy the insured represented that he never had been rejected for life insurance by the defendant or any other company. The question in the application read, "Have you ever been rejected or postponed by this or any other company or society?" The plaintiff asked for an instruction that this question "should be construed as referring to rejection or postponement for insurance of the same class and kind as that applied for in said application." The presiding judge refused to give this instruction. *Held*, that the refusal was right, as the inquiry was not limited to any particular kind of contract, but was intended to elicit information upon the question whether insurance in any form had been refused upon the application of the insured. *Ibid.*
11. In an action on a policy of life insurance dated in December, 1904, where it appeared that in the application of which a copy was attached to the policy the insured had answered in the negative the questions whether he used ardent spirits, wine or malt liquors, and whether he ever had used them to excess, the defendant, without objection from the plaintiff, introduced in evidence a record of a court in a city in another State showing that in 1898 the insured had pleaded guilty to a charge of drunkenness, had been found guilty and had paid the fine imposed, followed by testimony of numerous witnesses tending to prove habits of intoxication on the part of the insured and his use of intoxicating liquor

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to excess. Against the exception of the plaintiff the presiding judge admitted in evidence the record of the conviction of the insured in the police court of Chicopee in September, 1903, showing that he pleaded guilty to the crime of drunkenness and was fined $5, which he paid, and also admitted, subject to the plaintiff's exception, in answer to a question in regard to the use of intoxicating liquors by the assured the answer "He was a man, at that time, who was frequently under the influence of liquor on the street, especially Saturday afternoons and through Sundays. That would be his time of leisure." *Held*, that the evidence was admitted properly upon the issues of the falsity of the representations made by the insured and his knowledge that they were false. *Langdeau* v. *John Hancock Ins. Co.* 56.

Admission in evidence of part of application for insurance offered by insurer to show representations made by insured which insurer asserted to be false, the part offered being the only part annexed to policy and remaining part not affecting right of insurer to avoid contract, held correct, see *ante*, 7.

Suicide of insured.

12. In a claim against a fraternal beneficiary corporation for a death benefit, the certificate on which the claim was made declared that it was issued on the condition that the statements made by the member in his application for membership and the statements made by him to the medical examiner, both of which were filed in the sovereign secretary's office, were made a part of the contract and were full and true without any suppression of facts, and on the condition that the member should comply with the laws, rules and regulations governing the corporation. The certificate further provided that it should "be governed by, subject to and construed only according to the constitution, by-laws and regulations" of the corporation. The application for membership signed by the member contained the following statement: "I also consent and agree, that, if a certificate or policy is granted on this application, the same shall not cover . . . death by suicide, whether sane or insane." The by-laws of the corporation then in force provided that "each certificate shall be expressed to be void in the event of suicide, whether the member be sane or insane." It appeared that the member to whom the certificate was issued committed suicide as the result of acute melancholia. *Held*, that by the terms of the contract nothing was due on the claim. *Attorney General* v. *Colonial Life Association*, 527.

JUDGMENT.

Entry under R. L. c. 177, § 1.

1. Where a case in the Superior Court is ripe for judgment under R. L. c. 177, § 1, requiring that on the first Monday of every month judgment shall be entered in all actions ripe for judgment unless the court otherwise orders, the judgment goes into effect on the first Monday of the following month, even if the clerk fails to note that fact on the docket, and, if the clerk has made an unauthorized entry of judgment at an earlier date, this is immaterial. *Wallace* v. *Boston Elevated Railway*, 328.

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In Action by Infant Plaintiff.

2. In an action for personal injuries by an infant, brought for him by his next friend, if a reasonable settlement of the case is made fairly and both the next friend and the defendant desire to reduce it to judgment, and the plaintiff's counsel of record who has been informed of the settlement makes no objection to it, whereupon an agreement in writing for the entry of judgment and judgment satisfied is signed for the plaintiff by his next friend and is filed in court by the counsel for the defendant without signing it, the agreement is binding on the parties and the case is ripe for judgment. *Wallace* v. *Boston Elevated Railway*, 328.

Res Judicata.

3. A judgment for the plaintiff in an action for the price of radiators furnished for houses of the defendant under a contract in writing warranting the radiators to be capable of warming all rooms in which they were placed to seventy degree in zero weather, in which the defendant claimed in recoupment damages for a breach of this warranty and the plaintiff recovered the full amount claimed in his declaration, is a bar to a subsequent action by the purchaser against the seller for the breach of warranty. If at the trial of such subsequent action it appears that there was no zero weather before the trial of the first action, this is immaterial. *Berman* v. *Henry N. Clark Co.* 248.

4. A decision of this court on a petition for a writ of certiorari to quash a sewer assessment made under a statute alleged to be unconstitutional, refusing to grant the writ on the ground that, assuming the law to be unconstitutional, yet because of the laches of the petitioner and the circumstances of the case substantial justice did not require the quashing of the assessment on that petition, in no way sustains the validity of the statute, and cannot be used to defeat an action seasonably brought by the owner of other land affected by the same assessment to recover the amount of such assessment paid by him under protest on the ground that the statute is unconstitutional. *Smith* v. *Boston*, 31.

Statute of Limitations.

Provisions of R. L. c. 202, § 1, cl. 4, and § 19 do not apply to action on judgment shown to be unpaid begun more than twenty years after it was rendered, see LIMITATIONS, STATUTE OF, 1–3.

JURISDICTION.

1. An objection of substance to the jurisdiction of the court before which a case is being tried can be taken at any stage of the proceedings. *Corcoran* v. *Higgins*, 291.

2. If a judge sets aside a verdict and grants a new trial when he has no jurisdiction to do so, and the person in whose favor the verdict was rendered does not take any exception to the allowance of the motion for a new

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trial or to the order granting it, this does not preclude him from raising at the new trial the question of the court's jurisdiction to set aside the verdict. *Corcoran* v. *Higgins*, 291.

Of Superior Court in various matters, see SUPERIOR COURT.

Of police, municipal or district court to discharge debtor who has delivered himself up for examination without giving notice of his intention to do so to creditor, see POOR DEBTOR, 1–3.

Court of this Commonwealth has jurisdiction of suit in equity under R. L. c. 112, § 19, to enforce liability of directors of insolvent street railway company whose property is in hands of receivers appointed by United States court, receivers submitting to jurisdiction and corporation not being necessary party, see EQUITY JURISDICTION, 15.

Land Court and Superior Court on appeal from Land Court have jurisdiction to determine question of fact whether testator intentionally omitted to provide for children in his will, on petition to try title of land devised to petitioner to exclusion of testator's children, see LAND COURT, 1, 6, 7; SUPERIOR COURT, 2.

LABOR UNION.

Bill in equity to restrain members of labor union and corporation for which plaintiff was doing work under contract from unlawfully conspiring to compel plaintiff to employ only union men in work and from interfering with him in performance of contract to do such work, see UNLAWFUL INTERFERENCE, 1–3.

LACHES.

Decision of this court refusing writ of certiorari to quash sewer assessment alleged to have been made under unconstitutional statute, rendered on ground that petitioner was guilty of laches and that substantial justice did not require issuance of writ, in no way sustains validity of statute or prevents one acting seasonably from maintaining action for money paid as tax under protest, see JUDGMENT, 4; TAX, 1.

No such laches as to bar action of tort for conversion is to be imported from delay of plaintiff for two years in making demand from person who cashed check payable to plaintiff for plaintiff's special agent, who had no authority to indorse it, and then collected check from plaintiff, agent having embezzled proceeds and plaintiff having been diligent in searching for him, see BILLS AND NOTES, 4.

LAND COURT.

Jurisdiction.

1. On a petition to the Land Court to establish a title to land devised to the petitioner to the exclusion of the testator's children, for whom no provision was made in his will, that court has jurisdiction to decide the question of fact whether the omission of the testator to provide for his children was intentional. *Woodvine* v. *Dean*, 40.

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Appeal.

2. On an appeal from the Land Court to the Superior Court under St. 1904, c. 448, § 8, no matters can be tried in the Superior Court except those specified in the appeal, and if an appeal contains no such specification it must be dismissed. *Mead* v. *Cutler*, 277.
3. A party may be aggrieved by a decree of the Land Court so as to have the right of appeal to the Superior Court under St. 1904, c. 448, § 8, in respect to a matter concerning which he has introduced no evidence, or after he has been defaulted or nonsuited. *Ibid.*
4. A party to a writ of entry brought in the Land Court is not deprived of his constitutional right to a trial by jury by the provision of St. 1904, c. 448, § 8, limiting the matters to be tried by jury on an appeal to the Superior Court to those which are specified in the appeal, this being a reasonable regulation of the manner in which the right may be exercised. *Ibid.*
5. On an appeal from the Land Court to the Superior Court under St. 1904, c. 448, § 8, the matters whereby the appealing party is aggrieved may be specified by means of the issues which he desires to have framed as a part of his appeal, although a direct statement of them in the appeal would be more satisfactory. The fact that such matters are stated in the form of questions is immaterial. *Ibid.*
6. St. 1905, c. 288, providing that on an appeal from the Land Court to the Superior Court the judge who rendered the decision appealed from shall file in the Superior Court a full report of his decision, which shall be *prima facie* evidence as to the matters therein contained, relates only to procedure as to evidence, and is applicable to the trial of an issue in an appeal to the Superior Court in a case which was begun by a petition filed in the Land Court before the passage of the statute but in which the decision appealed from was not given until after the statute took effect. *Woodvine* v. *Dean*, 40.
7. St. 1905, c. 288, provides that on an appeal from the Land Court to the Superior Court the judge who rendered the decision appealed from shall file in the Superior Court "a full report of his decision and of the facts found by him so far as they relate to or bear upon any questions involved in the appeal." On such an appeal the only question in controversy was whether the omission of the testator under whom the petitioner claimed to provide in his will for his children was intentional, and the report of the judge after stating the issue was in these words: "At the trial before me the only testimony in the case was to the effect that such omission was intentional, and I so found." *Held*, that the report was sufficiently full for the purposes for which it was made, and was in substantial compliance with the requirements of the statute. *Ibid.*

On appeal from Land Court, Superior Court has jurisdiction to determine question of fact whether testator intentionally omitted to provide for children in his will, on petition to try title of land devised to petitioner to exclusion of testator's children, see SUPERIOR COURT, 2.

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LANDLORD AND TENANT.

What Premises leased.

1. A lease of a hotel for ten years contained this description of the leased premises: "buildings numbered 625 to 631 inclusive on Washington Street, Boston, Mass., together with the basement under said premises, meaning thereby the entire buildings, containing stores, and all floors over said stores meaning thereby all the real estate I now own on Washington Street excepting the building known as the Park Theatre." The lessor owned the adjoining building known as the Park Theatre and owned also a covered passageway leading from Washington Street, called a court, about eighty feet long and from ten to fourteen feet wide which for about twenty years had been used as an exit from the theatre, constituting a necessary part of its exits required by the building laws of the city of Boston, and which also was used as a passageway in connection with the hotel, from which two small doors opened upon it. This court was paved with stone flagging and was arched over, and a part of the hotel was built above it. The assignee of the lease closed the court by locking a gate at its entrance and claimed the right to use it for mercantile purposes. In a suit in equity to enjoin such use, it was *held*, that the description of the leased property included only buildings and that the court was not a building, that, if the court could be treated as belonging to a building, it was excluded expressly from the lease as a part of the Park Theatre, and that at any rate the right to the continued use of the court as an appurtenance of the theatre was included in the exception of the theatre building, so that the defendant's only right in the court was to use it as a passageway appurtenant to the hotel. *Crabtree* v. *Miller*, 123.

Covenants.

2. A lessor who terminates a lease by entering and expelling the lessee for non-payment of rent cannot recover from the lessee for the loss of rent sustained by him in consequence of such termination unless the lease contains a covenant giving him that right. *Sutton* v. *Goodman*, 389.
3. Where by the terms of a lease the rent is payable in advance in monthly instalments on the first day of each month during the term, and the lease provides that upon a failure by the lessee to pay any of the monthly instalments when due the lease at once shall become null and void, if, after a default in the payment of rent on the first day of a month, the lessor on the second day of the month terminates the lease in accordance with its terms, he cannot recover from the lessee the rent for that month. *Ibid.*
4. Where there is a covenant in a lease that a sum of money deposited by the lessee as security for the performance of the terms of the lease shall be returned at the expiration of the lease if no default shall have been made, or, if a default shall have been made, the lessor "may retain so much thereof as will properly compensate him, and the balance, if any,

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shall, upon the expiration of this lease, be paid to said lessee," a termination of the lease by the lessor by lawfully evicting the lessee for non-payment of rent is an "expiration" of the lease within the meaning of the covenant. *Sutton* v. *Goodman*, 889.

5. In an action to recover the sum of $300 deposited with the defendant as security for the performance of the terms and obligations of a lease to the plaintiff which the defendant had terminated, it appeared that by the terms of the lease the rent of $75 a month was payable in advance on the first day of every month during the term, and that upon the failure by the lessee to make any of the monthly payments when due the lease should at once become null and void, the lessor being given the right to enter and expel the lessee. The lessee further agreed to pay the rent during the term, "and for such further time as [he] may hold the said premises." On the first day of a month the plaintiff made default and refused to make further payments of rent under the lease. On the second day of the month the defendant terminated the lease and ordered the plaintiff to quit the premises, but the plaintiff continued to occupy the leased premises until the twenty-second of the month when the defendant expelled him and took possession. The lease contained the following provision in regard to the $300 deposited by the plaintiff as security: "If a default, however, shall have been made, then the [lessor] may retain so much thereof as will properly compensate him, and the balance, if any, shall, upon the expiration of this lease, be paid to said lessee." *Held*, that under the provision last quoted the plaintiff was entitled to recover the balance of the deposit after deducting the amount of the rent for the twenty days from the day when the lease rightfully was terminated by the defendant until the day when the plaintiff was expelled, the plaintiff having agreed to pay rent not only during the term but for such further time as he might hold the premises, but that the defendant, having terminated the lease, was entitled to no damages for its termination, in the absence of a covenant to make up any loss of rent sustained in consequence of such a termination, such as was enforced in Edmands *v.* Rust & Richardson Drug Co. 191 Mass. 123. *Ibid.*

6. Inserted among the covenants of a lease, and before the clause giving the lessor the right of re-entry for breach of covenant, was the following: "If the lessor or his assigns shall decide at any time to remove the buildings on the leased premises, he or they may terminate this lease by paying to the lessee the sum of $2,500." During the term of the lease, and when there had been no breach of covenant, the assignee of the lessor gave the assignee of the lessee a notice to quit and about a month later began to tear down the buildings. The assignee of the lessee sued for $2,500 under the clause of the lease above quoted. *Held*, that the clause sued upon was not a covenant to pay $2,500 as liquidated damages in case the lessor terminated the lease, but merely gave to the lessor the right, which he had not exercised, to terminate the lease by paying the lessee $2,500; so that the plaintiff's remedy, if any, was an action for such damages as he could prove that he had suffered from being evicted. *Harrison* v. *Jordan*, 496.

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Termination of Lease.

Construction of covenants of lease as to repayment after termination of lease by eviction of tenant of amount of deposit made as security for payment of rent, see *ante*, 2–5.

Proof of Continued Occupation.

7. A wharf corporation made a lease to a city of the right to use a part of its dock and flats "for a public float and landing place for boats" and "the right to drive, cap and maintain four oak piles, one at each corner of said float, to keep the same in position; also the right to build a platform" from one side of the pier "and a run or other suitable approach from said platform to said float, and to drive such piles as may be necessary in building said platform and approach." The city did all of these things. The lease contained a covenant by the city binding it to pay rent at the rate stipulated in the lease for such further time as it should hold the premises or any part thereof after the term of the lease or any extension of that term had expired. An extension of the term of the lease expired on December 1, 1901. In November, 1898, the city removed the float for repairs, and it never was brought back, but all the other structures erected by the city remained, as did also a notice purporting to be signed by the superintendent of streets reading "City of Boston Public Landing. Boats not allowed to tie up here." No notice of abandonment of the leased premises was given by the city. On August 6, 1903, the mayor sent a letter to the wharf company notifying it that at the end of the quarter which should begin next after that date the city would quit and deliver up the premises theretofore used by it for a float and landing place. Later the wharf company brought an action of contract on the covenants of the lease for the rent from March 1, 1903, to December 1, 1903. The plaintiff offered in evidence the letter of the mayor mentioned above which was excluded by the judge. The plaintiff also, for the purpose of showing that payments of rent were made by the defendant after the expiration of the extension of the lease up to April, 1903, offered in evidence entries in a book kept by the plaintiff's deceased wharfinger containing declarations to that effect. This evidence was excluded by the judge on the ground that no authority from the city to make the alleged payments had been shown. The judge also excluded evidence offered by the plaintiff to show that between December 1, 1901, and December 1, 1903, it made no charge for landing on the platform constructed by the defendant under the lease, although it made a charge after the last named date and made charges for a similar use of other parts of the wharf. The judge ordered a verdict for the defendant. *Held*, that the removal of the float for repairs by the defendant in November, 1898, did not constitute an abandonment of the premises; that the letter of the mayor should have been admitted in evidence as tending to show that the defendant was holding over when the letter was written; that in connection with other evidence it was competent for the plaintiff to show

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that it had recognized the alleged occupation of the defendant by refraining from making any charge for landing upon the platform; that the entries in the books of the deceased wharfinger should have been admitted in evidence, as in the absence of evidence to the contrary it would be presumed that the payments stated in the entries were made with authority; and that the liability of the defendant depended on whether it had occupied any part of the leased premises during the period sued for, which was a question of fact for the jury. *Commercial Wharf Corp.* v. *Boston*, 460.

In determining question whether city has abandoned certain leased premises, city occupies no more favored position than private citizen, see MUNICIPAL CORPORATIONS, 7; *post*, 7.

Subtenant.

Action by servant of tenant of building injured by starting of freight elevator, involving rights of plaintiff as licensee and of person starting elevator as servant of subtenant, see NEGLIGENCE, 68.

Landlord's Liability to Tenant.

Landlord who by agent institutes criminal proceedings against tenant solely for purpose of getting rid of him as tenant is liable to action for abuse of legal process, see ABUSE OF LEGAL PROCESS, 1, 2.

LEGACY.

See DEVISE AND LEGACY.

LIBEL AND SLANDER.

1. In an action for oral slander in charging the plaintiff with a crime the plaintiff may recover without showing special damage. *Crafer* v. *Hooper*, 68.

2. Where the circumstances are such as to make an oral charge of larceny a privileged communication if made in good faith and in a proper manner, although the communication does not become actionable merely because the speaker's language is intemperate and excessive from excitement, yet intemperance and excess of language beyond such as naturally would be aroused by the circumstances are evidence of express malice, which would make the communication actionable. *Ibid.*

3. In an action for oral slander in charging the plaintiff with larceny, where the defence set up is that the charge was a privileged communication made in good faith after the defendant had been informed that a pocket book in his house had been stolen, and there is evidence that the plaintiff was searched at the suggestion of the defendant, an instruction of the presiding judge is correct to the effect that if the defendant made the accusations of theft to humiliate the plaintiff and not for the purpose of recovering the missing money it would destroy the defence of privilege, and that in passing on that question the jury could consider the search

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made, and, if they found that it was made against the will of the plaintiff under threats of prosecution, they could consider that fact in determining whether the real motive of the defendant in making the accusations was to humiliate the plaintiff. *Crafer* v. *Hooper*, 68.

Objection by defendant in action for slander that definition of express malice given by judge in his charge was incorrect comes too late at argument of exceptions, where no exception thereto was taken at trial, see PRACTICE, CIVIL, 31.

LICENSE.

Ordinance of city as to licensing of vehicles used for conveyance of goods for hire from place to place within city held valid, see MUNICIPAL CORPORATIONS, 1.

On review of charges against member of licensing board under R. L. c. 100, § 4, decision of Superior Court is final, see SUPERIOR COURT, 3.

Extent of liability of owner of building maintaining freight elevator to one entering elevator as mere licensee, see NEGLIGENCE, 68.

LIMITATIONS, STATUTE OF.

1. In this Commonwealth there is no statute of limitations which applies to an action on a judgment which is shown to be unpaid. *Haynes* v. *Blanchard*, 244.
2. The provision of R. L. c. 202, § 19, that a judgment of record "shall be presumed to be paid and satisfied at the expiration of twenty years after it was rendered" relates only to judgments in regard to which there is no proof that they remain unpaid. *Ibid.*
3. The provision of R. L. c. 202, § 1, cl. 4, that "actions upon contracts which are not limited by the provisions of the following section or by any other provision of law" shall be commenced only within twenty years next after the cause of action accrues, does not apply to an action on a judgment of record, because such actions are limited by another provision of law contained in § 19 of the same chapter, and *semble* also because a judgment is not a contract within the meaning of the words "actions upon contracts" as used in the clause quoted above. *Ibid.*

LORD'S DAY.

1. It is no defence to a complaint under R. L. c. 98, § 2, for keeping open a workhouse on the Lord's Day, that the defendant conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day. *Commonwealth* v. *Kirshen*, 151.
2. One is guilty of keeping open his workhouse on the Lord's Day within the meaning of R. L. c. 98, § 2, if on that day his workhouse is opened to admit workmen who enter and work during the day and is opened again at the close of their work to allow them to leave, although the public are

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excluded and between the times of opening the doors are kept locked. *Commonwealth* v. *Kirshen*, 151.

MANDAMUS.

Petition by stockholder of corporation for writ of mandamus directing officers to allow him to inspect corporation's books, see CORPORATION, 6–9.

MARRIAGE AND DIVORCE.

Connivance.

1. If a husband, for the purpose of affording his wife an opportunity to commit adultery with a certain person and desiring that she shall do so in order that he may obtain a divorce, arranges with the owner of a house that it may be used by his wife on a certain evening without interference or interruption, and the wife knowing nothing of the arrangement commits the anticipated adultery there on that evening, these facts constitute connivance on the part of the husband, and he cannot maintain a libel for divorce by reason of the adultery. *Noyes* v. *Noyes*, 20.

Recrimination.

2. Where to a libel by a wife for divorce on the ground of adultery the husband by way of recrimination sets up previous desertion on the part of the libellant, and the trial judge finds that the charge of adultery is sustained and that the charge of desertion is not sustained, he should grant the divorce, and it is error for him to order that the libel be dismissed on the ground that, although the conduct of the libellant did not amount to desertion, "there was on her part such unmindfulness of marital obligations as to preclude the granting of her libel." *Cushman* v. *Cushman*, 38.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See AGENCY.

MAXIMS.

"*Omnia rite esse acta praesumuntur.*" See MUNICIPAL CORPORATIONS, 2.
"*Res ipsa loquitur.*" See NEGLIGENCE, 9, 16, 34, 75.
"*Volenti non fit injuria.*" See NEGLIGENCE, 72.

MECHANIC'S LIEN.

Intervening holders of mechanics' liens allowed priority over diligent creditor who by attending foreclosure sale prevented sacrifice of assets, see EQUITY JURISDICTION, 2.

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MINOR.

See INFANT.

MISTAKE.

Equity jurisdiction to reform or set aside contract because of mistake, see CONTRACT, 7.

MORTGAGE.

Of Personal Property.

Of household furniture.

1. Under St. 1892, c. 428, § 3, (R. L. c. 102, § 58,) providing that "no mortgage of household furniture on which interest is charged at the rate of eighteen per centum or more per annum, made to secure a loan of less than one thousand dollars, shall be valid unless it state with substantial accuracy the amount of the loan, the time for which the loan is made, the rate of interest to be paid, and the actual expense of making and securing the loan," in case a mortgage of the kind described by the statute is made without any expense of making and securing the loan this fact must be stated in the mortgage, and an instrument purporting to be such a mortgage which contains no statement on the subject is void. *Ternan* v. *Dunn*, 585.

Validity dependent upon delivery or record.

2. An unrecorded bill of sale of personal property intended as security for a loan cannot be effective against third persons either as a mortgage or a pledge unless the property is delivered to and retained by the mortgagee or pledgee. *Goodrich* v. *Dore*, 493.
3. Under R. L. c. 198, § 1, and the bankruptcy act of 1898 the holder of an unrecorded bill of sale of personal property, which was given as security for a loan by one who after its delivery became a bankrupt while still retaining possession of the property, has no title as against the trustee in bankruptcy. *Ibid.*

MUNICIPAL CORPORATIONS.

By-laws and Ordinances.

1. Under R. L. c. 25, § 24, a city has power to pass an ordinance requiring a license from the board of aldermen for every wagon or other vehicle used for the conveyance of goods for hire from place to place within the city, which applies to wagons used in the express business to transport from the railroad station to the persons in the city to whom they are addressed goods sent by express from other cities. *Commonwealth* v. *Beck*, 14.

Opinion of superintendent of wires of city as to what duties are imposed upon him by by-laws and ordinances is not admissible to prove what those duties are, see *post*, 5.

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Officers and Agents.

2. The acts of a public official are presumed to have been done rightly until the contrary is shown. *Commercial Wharf Corp.* v. *Boston*, 460.
3. In the cities and towns of this Commonwealth there is no power to remove public officers except that which is given by the statutes. *Attorney General* v. *Stratton*, 51.
4. Public officers, even when elected by the voters of a town to perform statutory duties which involve the expenditure of money properly raised by local taxation, are not the agents of the town. *Ibid.*
5. The inspector of wires of a city, appointed under an ordinance of the city establishing an inspection of wires department, cannot be allowed to testify to his opinion that it is not the duty of any person other than himself to enforce the provisions of the ordinance, the construction of the ordinance being a question of law. *Brunelle* v. *Lowell Electric Light Corp.* 407.
6. Where a city has authorized its mayor and its superintendent of streets jointly to make a contract in behalf of the city for covering a bridge with tar roofing felt preparatory to paving it with wooden blocks, and they make such a contract in writing, the superintendent of streets alone has no authority to make a subsequent oral agreement with the contractor as to what is the true construction of the contract. *Douglas* v. *Lowell*, 268.

If person without authority to do so agrees that city shall take and pay for certain materials and city uses them to its benefit, person who furnished materials has no right of action, see CONTRACT, 6.

Validity of condition as to paving street along which tracks are laid, imposed on street railway company by grant of location, and of contract between municipal officers and company as to such paving, see STREET RAILWAY, 1–3.

Notice of assignment of claim against city for work done and materials furnished, left at office of city clerk to be recorded with assignments of future earnings held not to make invalid payment to assignor afterwards made in good faith by city, see ASSIGNMENT, 1.

Questions as to duties of inspector of wires in city, and bearing of his construction of his duties upon question whether one extending electric light wires was negligent in failing to get permit to do so, see NEGLIGENCE, 65–67.

Under R. L. c. 100, § 4, no exception lies to rulings of judge of Superior Court on review by him of charges against member of licensing board of city and of evidence submitted thereunder to the mayor and findings thereon by him, see SUPERIOR COURT, 8.

Liability for Defects in Highways and Bridges.

Liability of municipality for injuries due to defects in highways and bridges, see WAY, 3–7.

Consideration of what is warning proper to be given to persons using city street by city engaged in repairing it and by street railway obliged by law to repair certain portions of it, see WAY, 5–7.

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City as Tenant.

7. On the issue whether a city has surrendered certain leased premises on the termination of a lease or has continued to occupy them so as to be liable on a covenant to pay rent during such occupation, the liability of the city is to be determined as that of any citizen would be. *Commercial Wharf Corp.* v. *Boston*, 460.

Action against city of Boston for rent of certain portion of Commercial Wharf, involving questions of continuance of occupation and breach of covenant, see LANDLORD AND TENANT, 7.

Effect of Use by Public.

Use by public of bridge is not acceptance of work done upon it by contractor who voluntarily failed to complete work according to contract, see CONTRACT, 4.

Use of materials by city and benefiting thereby gives owner of materials no right of action, see CONTRACT, 6.

Liability for Street Improvements.

Delay of city in making assessment of betterments resulting from construction of sewer held not to give plaintiffs right of action under contract which gave right to damages when betterments were assessed, plaintiffs not having requested that assessment be made, see CONTRACT, 20.

NEGLIGENCE.

Due Care of Plaintiff.

Of boy of seventeen working in stone quarry and relying upon being warned as to hoisted stone, see *post*, 14.

Of experienced workman in trench injured by falling upon him of stone improperly prepared for hoisting, he having assisted in such preparation, see *post*, 7.

Of inexperienced boy of nineteen injured because of defective spreader on sawing machine in box factory, see *post*, 19.

Of helper under carpenter performing ordinary carpentering work in his own way, which was negligent, and relying on assurance of carpenter, who did not know facts, that work was "all right," see *post*, 27, 28.

Of motorman on electric car who on foggy morning ran his car upon turnout when car was due from opposite direction upon same turnout, see *post*, 21.

Of experienced section-hand standing on track where he expected train, see *post*, 23.

Of girl of ten crossing street in front of car in plain sight, having nothing to distract her attention, see *post*, 38.

Of woman "chancing it" in crossing street in front of car she saw approaching, see *post*, 36.

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Of one crossing nearer track of street railway to take car on further track on dark and misty night and passing in front of car approaching at rate of twenty miles an hour on nearer track, see *post*, 37.
Of one driving across street railway tracks on wet and windy day in covered buggy, see *post*, 41.
Of one driving large team on dark night down steep grade on track of street railway, see *post*, 39, 40.
Of one riding bicycle on street in process of repair and disregarding signs and barriers, see WAY, 5, 7.
Of lineman on pole of telephone company relying on "boss" on ground to warn him of danger from passing street car, see *post*, 45.
Of one driving wagon loaded with stones weighing five or six tons down inclined roadway into excavation being made for building, see *post*, 72.
Of woman wearing rubbers walking on ice on cross walk of public highway, see NUISANCE, 4.
Of letter carrier falling into open bulkhead while walking on sidewalk and looking at letters in his hand, see *post*, 59, 60.
Of woman crossing street in leisurely manner, noticing projecting frog of street railway and then striking foot against it, see *post*, 46.

Assumption of Risk.

By employees, see *post*, 1, 5, 7, 18, 14, 25, 26.
Refusal to rule that plaintiff who drove wagon loaded with heavy stone down inclined roadway into excavation for cellar of building assumed risk of accident held correct, see *post*, 72.

Licensee.

Action by servant of tenant of building injured by starting of freight elevator, involving rights of plaintiff as licensee and of person starting elevator as servant of subtenant, see NEGLIGENCE, 68.

Trespasser.

Even without express provision of R. L. c. 111, § 267, railroad corporation would not be liable for causing death of trespasser walking on its road unless there was wilful or reckless misconduct on part of corporation or its servants, see *post*, 58.

Employer's Liability.

Assumption of risk.

1. A workman entering the employment of another person assumes all the obvious risks of that employment whether he knows of them or not. It is for him to determine whether he will make an examination of his place of employment before going to work or will take his chances. *McCafferty v. Lewando's French Dyeing & Cleansing Co.* 412.
By one assisting in moving foot of upright pole of derrick on upper floor of building in process of construction, all floors being open, see *post*, 5.
By employee in construction of sewer who had worked in stone quarry for

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ten years and was injured by stone being hoisted falling on him because fastened in improper manner, see *post*, 7.

By one employed in shoe factory who is injured while running machine for trimming heels because of unusual hardness of "veneering," see *post*, 26.

Seventeen year old boy working in stone quarry and relying on warning being given when stone was hoisted but who was not warned held not to assume risk of injury from stone falling upon him because of breaking of defective chain, *see post*, 14.

Workman in stone quarry held not to have assumed risk of injury from breaking of hoisting chain because of defect unknown to him, see *post*, 13.

Assumption by girl employed in shop of risk of injury from falling into obvious hole near place where employees got drinking water, see *post*, 25.

Notice.

2. In an action by an employee against his employer for an injury from an alleged defect in the ways, works or machinery of the defendant there is no difference, except in the amount to be recovered, between the liability under R. L c. 106, § 71, cl. 1, and at common law, so that the exclusion by the presiding judge of evidence offered by the plaintiff of notice under § 75 of the statute can do the plaintiff no harm even if the notice offered was a good one. *McCafferty* v. *Lewando's French Dyeing & Cleansing Co.* 412.

Ways, works or machinery.

Action by employee for injury due to breaking of hoisting chain in stone quarry, see *post*, 13–16.

Action by girl employed in workshop for injury resulting from her falling into obvious hole in floor near place where employees got drinking water, see *post*, 24, 25.

Actions by employees against employers for injuries resulting from defective or dangerous machinery or appliances, see *post*, 9–21; and because of dangerous place to work, see *post*, 22–25.

Superintendence.

3. In an action against a building contractor for causing the death of the plaintiff's intestate while in the defendant's employ by his being pushed from the third floor of a building in process of construction by the slipping of the foot of a gin pole or derrick which he was adjusting under the direction of a superintendent, if there is nothing to show that the superintendent did not have all the ropes necessary to move the gin pole, general questions by the plaintiff relating to the supply of ropes for hoisting purposes properly may be excluded. *Farrell* v. *B. F. Sturtevant Co.* 431.

4. In an action against a building contractor for causing the death of the plaintiff's intestate while in the defendant's employ, it appeared that the foreman of the defendant ordered a carpenter employed by the defendant to move a gin pole or derrick, used for hoisting floor beams, from a building which had been finished to the third floor of another building in process of construction, that the plaintiff's intestate was one of a gang of six or seven men employed in moving this pole, that after giving the order to the carpenter the foreman went away, and the carpenter proceeded to

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move the pole and got it substantially in position upon the third floor where it was to be erected, that, when with the assistance of the plaintiff's intestate the carpenter was moving the foot of the pole a little, the foot slipped and pushed over the plaintiff's intestate who fell one or two stories, receiving the injuries from which he died. *Held*, that the jury would be warranted in finding that the carpenter had charge of moving and putting up the pole, not as a workman, but as a superintendent acting as such with the consent of the defendant in the absence of the foreman. *Farrell* v. *B. F. Sturtevant Co.* 431.

5. In an action against a building contractor for causing the death of the plaintiff's intestate while in the defendant's employ, it appeared that the intestate was one of a gang of six or seven men engaged, under the direction of a person who could have been found to be acting as a superintendent, in moving a gin pole or derrick to the third floor of a building in process of construction, that the pole was substantially in position in the place where it was to be erected, that the foot of the pole rested on some planks which had been placed upon the floor beams a short time before, probably by the plaintiff's intestate and the others, and the top of the pole rested against a roof timber, that the fall had been taken from the pole and fastened to a roof timber to hoist the pole up, and had to be fastened to the top of the pole again, that for this purpose it was necessary to slide out the foot of the pole a little, that the superintendent and the plaintiff's intestate were trying to do this and the superintendent directed the plaintiff's intestate "to steady it, steady the bottom of it so it would not slide," that, when in accordance with this direction the plaintiff's intestate started to "move the bottom out," the pole "simply slipped and pushed him out, pushed him over" and he fell one or two stories, receiving the injuries from which he died. The distance that the pole slipped was only "a couple of feet at the bottom." The plaintiff's intestate was an experienced carpenter and an active, intelligent and careful workman. *Held*, that, even if the plaintiff's intestate did not assume the risk of such an accident, there was no evidence that the accident was due to any negligence on the part of the superintendent. *Ibid.*

6. In an action under R. L. c. 106, § 71, cl. 2, by a teamster against his employer for personal injuries received when assisting in moving a wooden house, alleged to have been caused by the negligence of a superintendent of the defendant, it appeared that a person, who was admitted to be a superintendent within the meaning of the statute, ordered the plaintiff to unhitch his horse from the wagon in order to haul certain heavy timbers up to the house, and ordered another workman to make fast to the timber, which he did, that the plaintiff hitched to the timber and started the horse but the chain slipped, and as the plaintiff was in the act of prying two of the timbers apart, to make it easier for the horse to haul the timber to which the chain was attached, the superintendent took hold of the horse's head and started him, causing the plaintiff to be caught between two timbers and injured. *Held*, that there was evidence of due care on the part of the plaintiff and of negligence on the part of the superintendent; and that the act of the superintendent in starting the horse,

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although in itself an act of manual labor, could be found to have been done as an act of superintendence for the purpose of assisting in doing what he as superintendent had ordered to be done. *Coates* v. *Soley*, 386.

7. In an action against a city by a laborer employed by it in digging a trench for a sewer, for personal injuries from a stone falling upon him which some fellow workmen on the bank under the direction of a foreman were attempting to pull out of the trench, it appeared that previously the plaintiff had worked for ten years in a stone quarry where stones were hoisted, although his own work was drilling, that the plaintiff at the suggestion of the foreman, assisted by another workman, had fastened the rope around the stone, that the stone was two or three feet long and eighteen or twenty inches thick, weighing between three and four hundred pounds, that it was egg-shaped and its surface was smooth and slimy, that the plaintiff and his fellow workman in the trench were assisting in raising the stone by lifting and pushing, when the rope slipped and the stone fell on the plaintiff, causing the injuries. There was evidence that one of the men on the bank said that the rope was not going to hold, and that the foreman replied to him "You never mind the rope. You pull up the stone." There was nothing to show that this reply was heard by the plaintiff. *Held*, that the danger was an obvious one understood by the plaintiff and that by choosing to place himself underneath the stone, where if it slipped it would fall on him, he failed to exercise due care; *also*, that the reply of the foreman to the workman on the bank, although it might be evidence of negligence on the part of the defendant, furnished no excuse for the failure of the plaintiff to exercise due care. *Moran* v. *Chelsea*, 428.

8. At the trial of an action by a coal trimmer against his employer, a stevedore engaged in loading a certain vessel with coal, for injuries from a barrow of coal being dumped upon him as he was going down a ladder in the fore hatchway of the vessel, it appeared that the plaintiff was one of a gang of twenty or twenty-two men employed by the defendant under the charge of a superintendent, and that the vessel was being loaded at both the forward and the after hatch which were about forty feet apart. The plaintiff contended that the superintendent ordered the wheelman who dumped the coal on him to dump it when he did. The plaintiff testified that before he started to go down the ladder from the hurricane deck this wheelman spoke to him and that at that time the superintendent was near the after hatch where he could see and be seen by this wheelman but that the plaintiff "was not in plain sight" of him. The wheelman testified that before he emptied the barrow one of the boys (not the superintendent for he knew the superintendent's voice and the voice was not his) called out "Come on with the coal." The plaintiff called another wheelman, who was at the after hatch, a trimmer who was waiting to follow the plaintiff down the ladder of the fore hatch, another workman at the fore hatch and still another who was at the after hatch, and each of them testified that he did not give this order. No witness testified that the superintendent gave it. The plaintiff did not call all the men who appeared by the evidence to have been on the hurricane deck at the time.

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Held, that, assuming that the words were an order and that the order was given to the wheelman at the fore hatch and not to the wheelman at the after hatch, the evidence did not warrant a finding that the superintendent gave it. *Griffin* v. *Curran*, 359.

Action by helper under carpenter injured while nailing new stringers on rotten planks covering vat in tannery, who was told by superintendent, not knowing facts, "those are nailed all right," and then was injured by stepping upon stringer and falling into vat, see *post*, 27, 28.

Defective and dangerous machinery and appliances.

9. The falling on the head of a man, who is working in a sewer in process of construction, of an iron buffer suspended on the rod of a Carson trench machine and used to control the passing of the excavating buckets can be in itself evidence of negligence. *Sullivan* v. *Rowe*, 500.

10. In an action by a workman against his employer for personal injuries from an iron buffer of a Carson trench machine, which was suspended over a sewer in process of construction, falling on his head while he was working in the trench, the plaintiff may show the condition immediately after the accident of the bolt from which the buffer was suspended. *Ibid.*

11. In an action by a workman against his employer for personal injuries from an iron buffer of a Carson trench machine, which was suspended over a sewer in process of construction, falling on his head while he was working in the trench, if the circumstances are such that the falling of the buffer is in itself evidence of negligence, the fact that the plaintiff has introduced evidence in attempting to show why it fell does not preclude him from relying on the doctrine of *res ipsa loquitur*, which entitles him to go to the jury on showing that the accident happened. *Ibid.*

12. In an action by a mason against his employer, a corporation engaged in doing the mason work for a large coal pocket, for personal injuries from an iron beam falling upon him while being hoisted by means of a derrick maintained and operated by the defendant, if it appears that the accident was due to the negligence of a foreman of another corporation, which was doing the iron work for the coal pocket, in fastening the iron beam to the fall of the derrick with a chain which was intended to be used for heavier beams and was too large and inflexible to "bind" and hold the small beam that was being hoisted, and it also appears that the chain was suitable for some of the hoisting that was to be done and that the defendant provided proper straps and slings for the hoisting of small beams like the one that slipped through the chain and fell on the plaintiff, there is no evidence of negligence on the part of the defendant. *Conroy* v. *Morrill & Whiton Construction Co.* 476.

13. A workman in a stone quarry does not assume the risk of injury from a stone falling upon him owing to the breaking of a defective link in a chain by which it is being hoisted if the defect is unknown to him and is due to the negligence of a servant of his employer in overheating the link when welding it. *Morena* v. *Winston*, 378.

14. In an action under R. L. c. 106, § 73, by the next of kin of a boy seventeen years and six months of age, for causing his instantaneous death

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while employed in a stone quarry of the defendant, from a stone falling upon him owing to the breaking of a chain attached to a derrick by which it was being hoisted, if it appears that the boy had been in this country only two weeks and was employed by the defendant to assist a certain workman who was running a steam drill at the quarry near the derrick by doing what he was told to do by this workman, to whom the duty of instructing him had been delegated by the defendant's superintendent, and it can be found that under the instructions so given to him he had a right to expect that stones would not be swung over his head without a warning cry first being given, and if there is evidence that on this occasion no such warning was given, the question of the due care of the deceased is for the jury, as also is the question whether he had assumed the risk of such an accident. *Morena* v. *Winston*, 378.

15. In an action under the employers' liability act against the proprietor of a stone quarry for causing the death of an employee of the defendant through a defect in the condition of the ways, works or machinery of the defendant, if it appears that the death of the employee was caused by a stone falling upon him as it was being swung over his head by a derrick owing to the breaking of a defective link in the chain by which it was suspended, and that the weakness of the link was due to its having been overheated when welded by a servant of the defendant so that its structure became crystallized to a dangerous degree, and there is evidence on which it can be found that the defect in the link might have been discovered by inspection and that no inspection was made, the question of the defendant's negligence is for the jury. *Ibid.*

16. The fact that a chain which in good condition would sustain a load of thirty-five hundred pounds broke under a load of only eighteen hundred pounds when there was no sudden or unusual strain upon it warrants a finding that the chain was defective. *Cushing* v. *Smith Iron Co.* 310.

17. In an action by an administrator for the death and conscious suffering of his intestate, while in the employ of the defendant caused by an iron column falling upon him owing to the breaking of a defective link of a chain by which it was being hoisted, it is no defence that there were on the spot other chains furnished by the defendant which were suitable and that the chain which broke was selected by a fellow servant of the plaintiff's intestate, if this chain when in proper condition would have been suitable and the fellow servant using such care as reasonably might be expected of him did not discern the defect. *Ibid.*

18. In an action by an administrator for the death and conscious suffering of his intestate while in the employ of the defendant caused by an iron column falling upon him owing to the breaking of a defective link of a chain by which it was being hoisted, there was evidence that the chain was part of a longer one which when purchased by the defendant was in sound condition, that the longer chain was cut up by the defendant and this part of it was fitted for use by adding to it a large link, in doing which the link which broke had been opened and after the large link had been inserted had been closed by a weld, that the weld was defective by reason of the carelessness of the smith who made it, and that the break-

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ing of the link was due to that defect. *Held*, that this was evidence of the defendant's negligence to be submitted to the jury; and that if the negligence in making the weld was that of a fellow servant of the plaintiff's intestate this did not relieve the defendant from liability. *Cushing* v. *Smith Iron Co.* 310.

19. If a boy nineteen years of age employed in a box factory is set to work at cutting pieces of wood for boxes upon a machine, in the use of which he is inexperienced, containing a circular saw revolving toward him against which he is to push a movable table holding the piece of wood to be cut, while attached to an adjoining stationary table about two inches back of the revolving saw is a flat piece of metal a little thinner than the saw called a spreader, intended to enter the slit in the wood as the saw cuts it and prevent the wood from closing on the saw, and if the screws attaching the spreader to the stationary table are loose, causing the spreader to go one way or the other, and this defect has existed long enough to have been known to the superintendent of the factory, but the danger from it is not known to the boy or appreciated by him and he has not been instructed in regard to it, and the boy is pushing a piece of wood on the movable table against the saw when owing to the looseness of the screws the spreader fails to enter the slit in the piece of wood but strikes the wood a little to one side of the cut causing the piece of wood to be stopped with a violent jerk and the boy's hand to be thrown forward upon the saw and he is injured, in an action by the boy against his employer for the injuries thus caused, these facts are evidence to go to the jury of the exercise by the plaintiff at the time of the accident of such care as reasonably could be expected of him, and of a failure on the part of the defendant, or of those for whose acts it was responsible, to use due care to keep the machine in a safe condition, and also of a breach of duty toward the plaintiff in failing to instruct him as to the effect of a loose or defective spreader. *Lynch* v. *Lynn Box Co.* 307.

20. In an action by an administrator against a street railway company for the death and conscious suffering of the plaintiff's intestate while employed as a conductor on a car of the defendant from being crushed between two cars, it appeared that the car of which the intestate was conductor had stopped very near the other car, which was standing still, for the purpose of shifting the ends and running it out in the opposite direction, that the motorman had taken his controller handles and shifted ends, and the intestate had swung his trolley around and was trying to adjust it, and in attempting to do so stepped upon the fender of the adjacent car, the motorman of which standing upon the platform took hold of the trolley rope with both hands to assist him, when the adjacent car suddenly started and the plaintiff was crushed between the cars. The motorman who was trying to assist the plaintiff testified that he did not know the cause of the accident, that he did not know whether his car moved or not, that he did not touch the controller handle of his car and that immediately after the accident the handle was in the same position that it was when he stopped the car. He further testified that before the accident the car had made no sudden starts and that after the accident it went "perfectly

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properly" to its destination and was in first class condition. An expert testified that a car could be started by a short circuit, which exists where there is a leak, that he never had seen a car started by a short circuit, and that he had heard of cars starting of their own accord but could find no evidence of a short circuit in them. The presiding judge ordered a verdict for the defendant. *Held*, that the verdict was ordered properly; that, assuming that the jury could have found that the car started of itself, and assuming also that such starting would be evidence of a defect, there was no evidence of negligence on the part of the defendant in failing to discover a defect if there was one. *Curtin* v. *Boston Elevated Railway*, 260.

21. In an action against a street railway company for injuries incurred while the plaintiff was operating a car of the defendant as a motorman by reason of a collision of that car with another car of the defendant going in the opposite direction upon the same single track, it appeared that the plaintiff was operating a car bound outward from a city, and that a short time before the accident occurred his car was on one of two parallel tracks approaching a portion of the road where there was a single track for four hundred yards, with a turnout three hundred yards from the point where he would enter the single track, that he knew his car was late, and also knew that an inward bound car was due at the turnout in about one minute, that a rule of the defendant provided that inward bound cars had the right of way, and provided also that the utmost care and judgment must be used in the operation of cars on a single track and that the danger of collision in the night or during fog or storm must always be borne in mind, that it was in fact the custom for the inward bound car to leave the turnout and enter on the single track unless the outward bound car was in sight, that owing to a grade and a curve an outward bound car was hidden from a car on the turnout until it was within fifty yards from the turnout, that it was before seven o'clock on a foggy morning at the end of October and the plaintiff could see only three or four car lengths ahead, that the lights of the car were lighted and the rails were slippery, that to get to the turnout before the inward bound car would leave it, if on time, the plaintiff would have to run his car at the rate of about ten miles an hour, that he entered on the single track and owing to the fog and the condition of the rails ran his car at the rate of only six or seven miles an hour for fifty or seventy-five yards when the other car loomed up out of the fog about three or four car lengths away, that he put on the brakes, which did not hold, and then let them off and put on the reverse lever, which did not stop the car, and the collision occurred. *Held*, that in entering on the single track when under the circumstances he could not run the car prudently at the rate necessary to reach the turnout in safety the plaintiff as matter of law was negligent and this negligence contributed to the injury, so that he could not recover even if the defendant was negligent. *Barry* v. *Boston Elevated Railway*, 265.

Dangerous place to work.

22. A man employed to watch over Saturday night and Sunday an unfinished temporary wooden building open at the ends, who, knowing that

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the building is not ready for occupancy, goes into it during an unusually severe gale to take out a pick and shovel and is injured by the building being blown over and collapsing, where it does not appear that the collapse of the building was due to any negligence in its construction, cannot recover against his employer for his injuries. *Glennon* v. *Everson*, 314.

23. An experienced section hand, engaged in tamping ties on one of four parallel tracks of a railroad where trains are running at frequent intervals, who, when the smoke from a locomotive engine passing upon a parallel track has obscured the tracks for a considerable distance, is apprehensive of danger and stands in the middle of a track looking toward a station from which a train must come and is struck by a train which suddenly emerges from the smoke, is not in the exercise of due care. Under such circumstances common prudence requires him to stand by the side of the track and wait there for the smoke to lift. *Cannon* v. *New York, New Haven, & Hartford Railroad*, 177.

24. In an action by an employee against his employer for an injury on the first day of the plaintiff's employment caused by his stepping into a hole in the floor of the room in which he was put to work, it is proper to exclude a question by the plaintiff to the foreman in charge of the defendant's building, whom he has called as a witness, asking him whether before the day on which the plaintiff was employed the opening was covered in any way. *McCafferty* v. *Lewando's French Dyeing & Cleansing Co.* 412.

25. A circular tank about five feet in diameter was placed in a square hole in the floor of a room forty feet by thirty or thirty-five feet where girls were employed to mend curtains. The bottom of the tank was about four feet below the floor and its top about five feet above the floor. There was an open space of about eighteen inches between one of the corners of the hole and the round surface of the tank. The employees were in the habit of getting water to drink from a pipe which ran into the tank. A girl on the first day of her employment, a little more than four hours after she had been put to work, felt thirsty and, having seen two other girls go to this pipe for water, went with two fellow employees to get a drink there. When she was stepping aside to make it convenient for one of her fellow employees who had taken the first drink to pass her, she fell into the hole and was injured. She did not see the hole because she did not look at the floor, but the hole would have been seen by any one who was looking on the floor. In an action against her employer for the injuries thus caused it was *held* that she could not recover, the risk being an obvious one which she assumed in going to work at that place. *Ibid.*

Dangerous material to work with.

26. An experienced workman in a shoe factory employed to run a machine for shaving or trimming heels assumes the risk of an injury caused by the "veneering" put in between the sole of a shoe and the upper being harder than usual, the degree of hardness depending on the amount of water absorbed by the veneering when "tempered," this being an obvious risk incident to his employment, and he none the less assumes this risk if three

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or four days before suffering an injury from this cause he complained to the foreman of his employer that the veneering used was not of proper stock and the foreman explained that this was because the regular stock had run out and that the trouble would be over as soon as the temporary stock was exhausted, and the temporary stock had been exhausted and "the shoes came all right" until the accident happened. *Loynes* v. *Loring B. Hall Co.* 221.

Failure to warn.

27. If a workman employed in a tannery as a helper under a carpenter is set to work to do an ordinary piece of carpentering in his own way, and does it in a negligent way by "toe-nailing" new stringers to old rotten planks, and the carpenter under whom he works comes along and says "those are nailed all right," and afterwards the helper steps on one of the stringers which gives way and he falls into a vat below and is injured, in an action against his employer for the injuries he cannot rely on the words of the carpenter as an assurance of safety, as he knew of the defect and the carpenter did not. *Lavelle* v. *Dunn-Green Leather Co.* 294.

28. If a workman, employed in a tannery as a helper under a carpenter, who previously has worked for the same employer in the vats of another tannery for twenty-five years, is told by the carpenter to cover over an old tanning vat which has not been in use for fourteen years, his only instructions being to get two stringers, put them in and nail new planks to them, and proceeds to lay two new stringers next to two old rotten planks which already are across the top of the vat and to spike them laterally to the old planks without providing further support, and then steps on one of the stringers which gives way, and he falls into the vat and is injured, his injuries are the result of his own negligence and his employer is not liable. *Ibid.*

Causing death.

29. A violation of R. L. c. 104, § 44, requiring temporary floorings to be laid during the construction of an iron or steel framed building, is not evidence of negligence in an action against a contractor constructing such a building for causing the death of an employee by his being pushed from the third floor of such a building by the slipping of the foot of a gin pole or derrick as he was adjusting it and falling to and through the second floor of the building on which no close plank flooring had been laid, as the violation of the statute was not a cause contributing to the accident but only a condition under which it occurred. *Farrell* v. *B. F. Sturtevant Co.* 431.

30. In an action under R. L. c. 106, § 73, by the mother and only next of kin of a boy seventeen years and six months of age, for causing his instantaneous death, if it appears that the deceased had come from Italy and had been in this country only two weeks, that his father had died in Italy six years before, leaving the plaintiff as his widow wholly without means of support, that during the two years before the deceased came to this country he had worked for fifteen cents a day which he gave to the plain-

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tiff and which was her only source of income and that he came to this country to get money for her support, there is evidence for the jury that the plaintiff at the time of the death of the deceased was dependent upon his wages for support within the meaning of the statute. *Morena* v. *Winston*, 378.

Action by administrator of deceased employee of defendant for death and conscious suffering of intestate injured by falling of iron column due to hoisting chain breaking because of alleged defect in chain caused by improper welding of link by smith under same employer as plaintiff's intestate, see *ante*, 16–18.

Fellow servant.

31. If a coal trimmer while going down a ladder in the hatchway of a vessel is injured by a barrow of coal being dumped upon him through the negligence of a fellow workman, who has been selected by the superintendent in charge to see that each man is safely down before any coal is dumped into the hatch, he cannot recover from their common employer. *Griffin* v. *Curran*, 359.

In action against employer for death and injury to plaintiff's intestate due to breaking of hoisting chain, fact that fellow servant of intestate selected chain from among others which were good is no defence if the chain selected did not appear defective; nor is fact that chain was made defective by negligence of smith under same employer who prepared it for use, see *ante*, 17.

Street Railway.

Injuries to employees.

Actions against street railway company by employees for injuries, see *ante*, 20, 21.

Injuries to passengers.

32. The fact that a conductor of a street car has waited a reasonable time for a passenger to get on or off the car does not give him the right to start the car until he has exercised the highest degree of care consistent with the performance of his other duties to see that the passenger is on or off the car as the case may be. *Millmore* v. *Boston Elevated Railway*, 323.

33. At the trial of an action by a woman against a street railway company for injuries caused by the sudden starting of a crowded open car of the defendant on a very dark night while the plaintiff was on the running board picking up a bundle from the floor of the car before alighting, it is error for the presiding judge to instruct the jury that the highest degree of care required from the defendant as a carrier of passengers made it the duty of the conductor before starting his car to move even to the extent of getting off the car to see whether the plaintiff had got off. The true rule is that in such a case a conductor before starting his car is bound to know, if by the exercise of due care, caution and diligence in the discharge of his duties he can know, whether any person is getting on or off the car. *Ibid.*

34. Although there may be movements of an electric street car so violent

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that a mere description of them and of their results may justify the inference that they were attributable to negligence on the part of the carrier operating the car, yet the fact that a car, which has lessened its speed in approaching a stopping place and is moving slowly but has not reached the stopping place, gives a "plunge forward . . . as though the electricity of the motor or the power had been applied," which also is described by different witnesses as a "jump," a "kind of a lurch" and a "jar ahead to a considerable extent," in the absence of evidence of any defect in the car or the track or of incompetency of the carrier's servants, is no evidence of negligence to support an action against the carrier for injuries from a fall caused by such a movement. *Sanderson* v. *Boston Elevated Railway*, 337.

35. In an action against a street railway company by a woman passenger for personal injuries incurred while alighting from a car of the defendant, after being told by the conductor to change to another car, by stepping on some yielding earth at a place where repairs were being made and spraining her ankle, if it appears that the accident occurred in a public highway where the repairs which required the change of cars and occasioned the presence of the soft earth were being made by a railway company other than the defendant, over whose track the defendant operated its cars in that highway under an agreement which gave it no control of the track or repairs thereon, and if there is nothing to show that the conductor or the defendant or its agents knew or should have known that the ground on which the plaintiff stepped was likely to yield, and the plaintiff herself testifies that it appeared to her "as though everything was all right," that it "was kind of gravelly down there" and "looked level with the road," there is no evidence for the jury of negligence on the part of the defendant in selecting a place for the plaintiff to alight. *Rose* v. *Boston & Northern Street Railway*, 415.

What is reasonable care required of common carrier of passengers toward passenger, see CARRIER.

Injuries to travellers on street.

36. If a woman after alighting from an electric car goes around the back of it and attempts to cross the parallel track in front of a car which she sees approaching on that track "rather fast" a little more than a car length away, thinking that she has plenty of time to get across and relying on the expectation that the motorman will lessen the speed of the car, and deciding to "chance it," she is not in the exercise of due care, and if she is knocked down by the car she cannot recover from the company operating it for injuries thus caused, even if the motorman was negligent. *Madden* v. *Boston Elevated Railway*, 491.

37. In an action against a street railway company for personal injuries, where it appears that the plaintiff on a dark and misty night, in attempting to cross a track of the defendant in order to take a car which he saw approaching on the farther of its parallel tracks, walked in front of a car approaching on the nearer track at the rate of twenty miles an hour and was run down, if the plaintiff testifies that before crossing the track he

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looked to see whether a car was coming and did not see one, when the car in fact was in plain sight, this is not evidence of the exercise of due care, because if he looked he must have looked carelessly and is in no better position than if he had not looked at all. *Fitzgerald* v. *Boston Elevated Railway*, 242.

38. If a girl ten years and four months of age standing upon the curbstone of a sidewalk sees an electric car approaching when it is about eighty feet distant from her and, thinking that she has time to pass in front of it, starts to cross the street with the car in plain sight and with nothing to distract her attention, and, making no attempt to avoid the car either by quickening her pace or by waiting for it to pass, steps in front of the car and is knocked down and injured, she cannot recover for her injuries from the corporation operating the car, even if such operation is negligent, there being no evidence of such a degree of care on her part as reasonably can be expected from a child of her years. *Holian* v. *Boston Elevated Railway*, 74.

39. It is not negligence as matter of law to drive a large team on a dark night along the tracks of a street railway down a steep grade of a highway. One so driving has a right to assume that the motorman of a car approaching from behind will remember and recognize the use of the street by travellers and will exercise reasonable care to avoid running them down. *Chaput* v. *Haverhill, Georgetown & Danvers Street Railway*, 218.

40. In an action at common law by an administrator against a street railway company to recover for personal injuries of the plaintiff's intestate resulting in his death caused by the alleged negligence of the defendant's servants, if there is evidence that the plaintiff's intestate, at about eleven o'clock on a dark but pleasant night, was driving an ordinary large job wagon along the track of the defendant's railway upon a public way, that he was seated upon the floor of the wagon with the reins in his hands, that he looked back, and, neither seeing an approaching car nor hearing any gong, kept on, when without any warning a car of the defendant ran into the back of his wagon, throwing him out and causing the injuries sued for, the question of the due care of the plaintiff's intestate is for the jury, and it is for them to say whether, after looking back and neither seeing nor hearing an approaching car, he should have taken further precautions before keeping on upon the defendant's track. *Ibid.*

41. In an action against a street railway company for injuries to the plaintiff and to his buggy from being run into by a car of the defendant as th plaintiff was driving over the tracks of the defendant at a street crossing, there was evidence that it was a wet and stormy day with the wind blowing hard, that the car was going "at a break-neck speed" from twenty to twenty-five miles an hour, that no bell was rung and no gong was sounded. The plaintiff testified that when he turned upon the track he looked and saw no car, and knew positively "the car was not right within close proximity," that he put his head out of the buggy both before he turned to go across the track and after he had turned for the crossing, that he could not say that he looked the moment before his horse stepped on the second

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track, on which the car was coming, but while he was crossing over he looked through the glass in the top of the buggy, that the glass was wet with rain but did not obstruct his view, that the last time he put his head out his horse and buggy were about in the first track, that he got a view down the track as far as a street which was five hundred and sixty feet distant and saw no car, and that the point from which he looked was about twenty-five feet from the place where he was struck by the car. *Held*, it being conceded that there was evidence of negligence on the part of the motorman, that the question of the plaintiff's due care was one for the jury. *Grogan* v. *Boston Elevated Railway*, 448.

Injury to lineman on pole near track.

42. At the trial of an action by a lineman in the employ of a telephone company against a street railway company for injuries from being struck by a car of the defendant as he was climbing a pole of his employer between two tracks of the defendant, where it appears that near the pole a sewer was being constructed and on each side of the trench were two red flags, there is no error in admitting evidence that these flags were used as danger signals, to warn people and "also the cars, particularly the cars," that a dangerous construction was going on there, this being admissible to show the condition of things at the time of the accident. *Ahearn* v. *Boston Elevated Railway*, 350.

43. At the trial of an action by a lineman in the employ of a telephone company against a street railway company for injuries from being struck by a car of the defendant as he was climbing a pole of his employer between two tracks of the defendant, where it appears that the plaintiff was going up the side of the pole nearest to the track on which the car was approaching, evidence that in stringing wires on poles near street railway tracks it was customary for men upon the ground to give notice to linemen of an approaching car, is admissible upon the issue of the plaintiff's due care. *Ibid.*

44. At the trial of an action by a lineman in the employ of a telephone company against a street railway company for injuries from being struck by a car of the defendant as he was climbing a pole of his employer between the tracks of the defendant, where it appears that the plaintiff was going up the side of the pole nearest to the track on which the car was approaching, if the plaintiff is asked why he went up that side of the pole, and answers that it "was the safe side to go," this must be interpreted to mean that the plaintiff thought at the time that it was the safe side, and is admissible as a reason for his action. Following McCrohan *v.* Davison, 187 Mass. 466. *Ibid.*

45. In an action against a street railway company by a lineman employed by a telephone company for injuries caused by the plaintiff being struck by a car of the defendant as he was climbing a pole of his employer, if it appears that the pole was between two tracks of the defendant, that the plaintiff was equipped with "spurs, belt, pliers and cutters," and had in his hands the hand line attached to the wire which was to be strung upon the pole, that before he started to ascend the pole he saw a car approach-

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ing on one of the tracks about one hundred and fifty feet away, which appeared to be going at the rate of ten miles an hour, that he then was ordered by the "boss" in charge of the work to ascend the pole, and went up the side nearest to the track on which the car was approaching, with his back to the track, knowing that when he got upon the pole it would be impossible for him to look to see where the car was, that it was customary for the men on the ground to give warning of the approach of a car, and that the "boss" on the ground motioned for the car to stop, but the motorman disregarded the warning and ran by the pole which the plaintiff was climbing, causing the accident, there is evidence for the jury of due care on the part of the plaintiff, as the jury can find that the plaintiff relied and had a right to rely upon the "boss" to notify the car to stop and to give him notice of any impending peril while he was on the pole, and the fact that the warning was to have been given by a person not in the service or control of the defendant is immaterial upon the question of the plaintiff's due care; and also there is evidence of negligence of the defendant. *Ahearn* v. *Boston Elevated Railway*, 350.

Injury due to projection of track above surface of highway.

46. If on a summer afternoon a woman while walking in a leisurely manner over the cross walk of a city street, with which she is familiar, at the corner of an intersecting street where in the centre of the street there is a frog of a street railway track projecting one, two or possibly three inches above the flagging of the cross walk, there being no car to cause her to hurry and nothing to disturb her or distract her attention, notices the projection of the frog, and, instead of stepping over it, strikes her foot against it with such force as to throw her down, she is not in the exercise of due care and cannot maintain an action against the railway company maintaining the track for injuries thus caused, even if there is evidence of negligence on the part of such company in maintaining the frog at an unnecessary height above the pavement of the street. *Gilligan* v. *Boston Elevated Railway*, 576.

Causing death.

Action against street railway company by administrator of conductor killed by sudden starting of electric car, cause not being shown and being wholly matter of conjecture, see *ante*, 20.

Declarations of one, who died by reason of injuries alleged to have been caused by negligence of street railway company, describing accident admissible under R. L. c. 175, § 66, at trial of action by administrator against company, see EVIDENCE, 3.

Elevated Railway.

47. In an action by a passenger against a corporation operating an elevated railway for personal injuries from being pushed off an overcrowded platform at a station, it is evidence of negligence on the part of the defendant that it failed to provide a sufficient number of competent servants to guard

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its passengers from the dangers incident to the platform being overcrowded. *Beverley* v. *Boston Elevated Railway*, 450.

48. If a corporation operating an elevated railway at certain hours of every week day assembles on the platforms of its stations such large crowds of passengers necessarily going in opposite directions, that on one of these occasions a passenger on the outside of the crowd, in spite of all he can do, is pushed off the platform into the adjoining pit in which the tracks are laid, and the accident is due solely to the ordinary crowding which occurs during rush hours, the railway company is liable to the passenger for his injuries thus caused. *Ibid.*

49. In an action by a passenger against a corporation operating an elevated railway for personal injuries from being pushed off an overcrowded platform at a terminal station of the defendant when attempting to go from a surface car to take an elevated train, it is evidence of negligence on the part of the defendant that the portion of the platform where passengers alighted from surface cars was too small to take care of the passengers who were landed on it; and it also is evidence of such negligence that a guard who should have been on this part of the platform to prevent pushing and crowding, if he could, was not there when the plaintiff was injured. *Ibid.*

50. In an action by a woman passenger against a corporation operating an elevated railway for personal injuries caused by the alleged negligence of the defendant in failing to provide for limiting or controlling the crowd of passengers upon the platform of one of its terminal stations, the presiding judge properly may refuse to allow the defendant to ask its superintendent of the division where the accident occurred whether in determining the plan of operating such a railway it is proper to take into consideration the desire of the travelling public to take their chances in the crowd rather than to be kept back, where such desire can be taken into consideration without interfering with safety in the operation of the railway, such inquiry not only being immaterial but tending to distract the attention of the jury from the issue of the defendant's negligence. *Ibid.*

51. In an action by a woman passenger against a corporation operating an elevated railway for personal injuries caused by the alleged failure of the defendant to limit or control the crowd of passengers upon a platform of one of its terminal elevated stations, the plaintiff on her cross-examination of a motorman of the defendant may ask him whether, if three cars each unloaded thirty-three passengers upon a certain part of the platform, it would make a fair sized crowd on that platform. *Ibid.*

52. In an action by a woman passenger against a corporation operating an elevated railway for personal injuries caused by the alleged failure of the defendant to limit or control the crowd of passengers upon the platform of one of its terminal elevated stations, the plaintiff, on her cross-examination of the chief inspector of the division of the defendant's railway in which the accident occurred, may ask him whether the size of the crowd on the platform of the station could be controlled by controlling the number of persons allowed to enter the station through the turnstiles, and by regulating the number of surface cars and the number of elevated trains

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allowed to go into the station. If the answer to this question is matter of common knowledge the defendant is not harmed by its admission, and, if not such matter, it is admissible. *Beverley* v. *Boston Elevated Railway*, 450.

53. In an action by a passenger against a corporation operating an elevated railway for personal injuries from being pushed off an overcrowded platform at a terminal station of the defendant when attempting to go from a surface car to take an elevated train, if there is evidence that the portion of the platform where passengers alighted from surface cars was too small for the purpose and might have been made larger, this is evidence of negligence on the part of the defendant in the construction or maintenance of its platform on which the plaintiff is entitled to go to the jury, although this ground of negligence was not alleged in the declaration, if the objection of the variance was not taken at the trial. *Ibid.*

54. In an action by a woman passenger against a corporation operating an elevated railway for personal injuries caused by the alleged failure of the defendant to limit or control the crowd of passengers upon the platform of one of its terminal stations, by reason of which the plaintiff in attempting to go from a surface car to take an elevated train was pushed off the platform and fell into the pit containing the adjoining surface car track, and was injured, the plaintiff offered to prove that at some time after the accident the defendant had extended its platform so as to cover twenty-five feet in length near the place where the plaintiff fell. The defendant's counsel had admitted that it was physically possible to increase the platform in this way but refused to concede that it was practically possible. The plaintiff offered the evidence to show that the increase of space was practically possible. The judge admitted the evidence for this limited purpose, instructing the jury that it was not evidence of negligence on the part of the defendant. *Held*, that the evidence was competent for the limited purpose for which it was admitted. *Ibid.*

Of one driving under elevated structure knowing that passage of trains on structure will frighten horse, see *post*, 61.

Railroad.

Injury to trespasser.

Where there was no wilful or reckless misconduct on part of railroad corporation or its servants, it was not liable at common law for causing death of one trespassing on its road; and by provision of R. L. c. 111, § 267, is expressly exempted from liability to such trespasser, see *post*, 58.

Injury to passenger.

Degree of care required of common carrier of passengers toward passenger, see CARRIER.

Failure to fence.

55. R. L. c. 111, § 120, requiring a railroad company to erect and maintain suitable fences upon both sides of its railroad, is intended only for the protection of the owners of adjoining lands, and imposes no duty on a railroad company to enclose any part of a freight yard so as to protect

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horses standing near its tracks from being frightened by freight trains. *Gerry* v. *New York, New Haven, & Hartford Railroad*, 35.

Horse frightened by train.

56. In an action against a railroad company for injuries to the plaintiff's horse caused by his being frightened by a freight train of the defendant when standing near the track as the train approached, the fact that the train made a noise is no evidence of negligence on the part of the defendant, if it does not appear that the train made any more noise than reasonably might be expected of such a train or that the noise that was made was due to any negligent act. *Ibid.*

57. In an action against a railroad company for injuries to the plaintiff's horse caused by his being frightened by a freight train of the defendant when standing near the track as the train approached, it is no evidence of negligence on the part of the defendant that the train was running faster than was allowed by the regulations approved by the railroad commissioners, even if the rate of speed had anything to do with the accident, as such regulations are made for the safety of the trains and in no way affect the duty of the railroad company toward the owner of the horse. *Ibid.*

Failure to have brakeman on last car of freight train.

Work train held not to be freight train within R. L. c. 111, § 200, so that railroad company would be negligent in not having brakeman upon last car, see RAILROAD, 1, 2.

Causing death.

58. By an express provision of R. L. c. 111, § 267, a railroad corporation is not liable for causing the death of a person while walking or being upon its road contrary to law or to the reasonable rules and regulations of the corporation. Even without such an express provision, there could be no liability to such a trespasser unless there was wilful or reckless misconduct on the part of the railroad corporation or its servants. *Durbin* v. *New York, New Haven, & Hartford Railroad*, 181.

In Use of Highway.

59. In an action against a brewing company for personal injuries from falling into an opening in the sidewalk of a city street from which the servants of the defendant had removed a bulkhead in order to deliver beer in the cellar of a hotel, if there is conflicting evidence as to whether the defendant's servants placed barrels on each side of the opening to prevent travellers on the street from falling into it or whether they left the opening unguarded, the question of the defendant's negligence is for the jury. *Owens* v. *Harvard Brewing Co.* 498.

60. In an action by a letter carrier against a brewing company for personal injuries from falling into an opening in the sidewalk of a city street from which the servants of the defendant had removed a bulkhead in order to deliver beer in the cellar of a hotel, if there is evidence that the plaintiff

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had delivered letters on this route for a number of years and had seen the bulkhead open about once a month during that time, that just previous to the accident he had delivered letters in the building next door to the hotel and had come out with a bundle of letters in his left hand at which he was looking when he walked into the opening, which extended about half way across the sidewalk, the question of the plaintiff's due care is for the jury. *Owens* v. *Harvard Brewing Co.* 498.

61. If a man driving in a buggy in a city street sees ahead of him the structure of an elevated railway under which he will have to pass and, knowing that his horse is likely to be excited by the passage of trains upon the elevated structure and when so excited is likely to quicken his pace, proceeds to drive under the structure in an ordinary way with a loose rein when a train suddenly appears overhead and, the horse becoming nervous and making a bolt forward, he draws back the reins until his hands are at his shoulders but owing to the looseness of the reins is unable to get proper control of the horse, and the horse knocks down and injures a woman crossing the street, this is evidence of his negligence in an action brought against him by the woman for her injuries. *Murphy* v. *Withington*, 28.

Of girl of ten years crossing street in front of car in plain sight, having nothing to distract her attention, see *ante*, 38.

Of one driving large team on dark night down steep grade on track of street railway, see *ante*, 39, 40.

Action against street railway company by one driving across street car tracks on wet and windy day in a covered buggy for injuries from being struck by electric car moving at high rate of speed, see *ante*, 41.

Action by lineman of telephone company who while on pole was struck by passing street car whose motorman had been warned by plaintiff's "boss" standing at foot of pole, see *ante*, 42–45.

Of woman walking on icy cross walk of public highway, see NUISANCE, 4.

Of one riding bicycle on street in process of repair and disregarding signs and barriers, see WAY, 5, 7.

Actions against municipalities for alleged defects in highway, see WAY, 3–7.

Of One owning or controlling Real Estate.

62. In an action by the owner of a building against the owner of the adjoining land for negligence in digging a trench on his own land so near the party wall that the plaintiff's building settled, whereby it was damaged and its rental value diminished, the measure of damages is the difference between the fair market value of the plaintiff's property before the injury caused by the defendant and its market value after such injury, and the cost of restoring the property to its former condition is not necessarily the criterion for determining the damage. *Hopkins* v. *American Pneumatic Service Co.* 582.

38. If the proprietor of a room for the sale of meats maintains a heavy door four or five inches thick opening from a refrigerating room, and a salesman of the proprietor invites a customer, who often has been through the

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door but has no reason to think that it will be opened quickly and violently, to come to a desk near this door to receive a slip showing the weight of his purchase, and the customer in stepping forward for this purpose is thrown down and injured by the sudden violent opening of the door due to the impetuosity of a servant of the proprietor when entering from the refrigerating room, in an action by the customer against the proprietor for his injuries thus caused there is evidence for the jury that the servant of the defendant in opening the door failed to exercise proper care to see that no one was injured. *Paine* v. *Armour*, 334.

64. If the proprietor of a room for the sale of meats maintains a heavy door four or five inches thick opening from a refrigerating room, and a salesman of the proprietor invites a customer, who often has been through the door but has no reason to think that it will be opened quickly and violently, to come to a desk near this door to receive a slip showing the amount of his purchase, and the customer in stepping forward for this purpose is thrown down and injured by the sudden violent opening of the door, which is made probable or necessary by the fact that the door has been bound at the bottom owing to the settling of the building so that it rubs against the floor, and this condition of things has existed for some time and has kept growing worse, in an action by the customer against the proprietor for his injuries thus caused there is evidence for the jury that the defendant has failed to take proper care for the protection of his customers against the violent opening of the door. *Ibid.*

Negligent extending of electric light wires in a building, see *post*, 65–67.

Action by girl employed in workshop for injury resulting from her falling into obvious hole in floor near place where employees got drinking water, see *ante*, 24, 25.

In Use of Electricity.

65. The question, whether the violation of a city ordinance in regard to the installation of wires by failing to notify the inspector of wires of an intended extension of electric light wires in a building and to obtain a permit for such extension contributed to an accident caused by a shock of electricity from the wire of such extension, if there is evidence on the subject, is a question of fact to leave to a jury. *Brunelle* v. *Lowell Electric Light Corp.* 407.

66. Upon the question whether injuries from a shock of electricity received from an electric light wire in a building were caused by the violation of a city ordinance in failing to notify the inspector of wires before installing the wire or to obtain a permit for doing so, it is not permissible to show that the inspector of wires in such cases allowed the ordinance to be violated by not requiring notice or that when he received such a notice he neglected to perform his duty of inspection. *Ibid.*

67. In an action against an electric light corporation for personal injuries from a shock of electricity received from a portable electric light attached to a wire which the plaintiff had installed in his cellar as an extension from the wires in his shop above in violation of a city ordinance which required him to notify the inspector of wires of the intended extension

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before beginning work on it and to obtain a permit for its installation, both of which he failed to do, it is error for the presiding judge to permit the inspector of wires to testify that in a case like this, where wires already were installed and an extension was to be made, it was not his practice to require an application to be made or a permit to be obtained before the current was turned on, that when he received a notice in such a case, if he thought there was no question about the contractor or about the premises, he did not go to examine the premises but relied on the notice, and that in the present case he knew the contractor employed by the plaintiff and that he stood well in his business; and it is further error for the judge to instruct the jury that in determining whether the plaintiff was negligent in not obtaining a permit they might consider the practice of the inspector not to grant permits, and that in determining whether the plaintiff's violation of the ordinance contributed to the happening of the accident they might consider whether the inspector if he had received the proper notice would have inspected this wire. *Brunelle* v. *Lowell Electric Light Corp.* 407.

In Use of Elevator.

68. If the lessee of a building containing a freight elevator sublets portions of the building, with the agreement and understanding that the subtenants and their employees as well as the lessee and his employees may use the elevator but that when any one of the occupants of the building is using the elevator he shall have the exclusive use of it until his use is completed, and if, while a servant of one of the subtenants is using the elevator and has not completed such use, a servant of the lessee at his own request is permitted by the servant of the subtenant to come upon the elevator with a truck holding a large crate, whereupon the servant of the subtenant starts the elevator and the servant of the lessee is injured, in an action by the person injured against the master of the servant who started the elevator, the plaintiff is in the position of a mere licensee and cannot recover unless he shows that the servant of the defendant injured him wilfully or acted with such wanton recklessness as to amount to a wilful wrong. *McManus* v. *Thing*, 362.

In Construction and Building Operations.

69. In an action for personal injuries from the collapse of a wooden building the fact that wire nails, which it appears are in general use, were used in the construction of the building is not evidence of negligence. *Glennon* v. *Everson*, 314.

70. In an action by an employee of a construction company, engaged in doing the mason work for a large coal pocket, against an iron company, engaged at the same time in doing the iron work for the same coal pocket, for personal injuries from an iron beam falling upon him when it was being hoisted by means of a derrick furnished and operated by the plaintiff's employer, if there is evidence that the defendant's foreman wished to use the iron beam and fastened it to the chain to be hoisted and that

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the accident was due to his negligence in selecting a chain which manifestly was unfitted for this work, although proper ropes for holding the beam had been provided by the plaintiff's employer, and in adopting an improper method of fastening the beam to the chain, and there also is evidence that the defendant's foreman, in fastening the beam to the chain was acting for the defendant and within the scope of his employment, there being no contention that the plaintiff was not in the exercise of due care, the question of the defendant's liability is for the jury. *Conroy* v. *Smith Iron Co.* 468.

71. In an action by an employee of a construction company, engaged in doing the mason work for a large coal pocket, against an iron company, engaged at the same time in doing the iron work for the same coal pocket, for personal injuries from an iron beam falling upon him when it was being hoisted by means of a derrick furnished and operated by the plaintiff's employer, there was evidence that the defendant's foreman, who was in charge of the iron work at the coal pocket and whose duty it was to select the iron beams for hoisting, attached the beam to the derrick by a chain which was an improper one for the purpose, that there were ropes called straps at hand, the purpose of which was to fasten a beam that was too small for the chain as this one was, and that the defendant's foreman made no use of these ropes. The foreman testified that, being desirous of having this beam hoisted, he told the tag man of the plaintiff's employer who was in charge of the derrick that he wanted the beam, that the tag man told him he was busy but that if the defendant's foreman "would hook on to the beam" he would hoist it for him, that the foreman then put the chain around the beam, and, while attempting to take two turns with the chain, told the tag man that he did not have chain enough and asked him to give him more, but that the tag man said that there was chain enough, that one turn was enough to put around the beam and refused to give him more chain, that thereupon the foreman took one turn around the beam, fastened the hook and said, "Go ahead," whereupon the tag man signalled to the engineer to hoist, that the engineer obeyed the order and the beam slipped from the chain and fell on the plaintiff. The judge, among other instructions, instructed the jury that if they found that the defendant's foreman asked for more chain and that the tag man of the plaintiff's employer did not give it to him and said that one turn was enough that would not be an excuse for the defendant's foreman. *Held*, that this instruction was correct, as, if the accident was due to the negligence of the defendant's servant or agent, the concurring negligence of the other contractor, if proved, would constitute no defence to the action. *Ibid.*

72. In an action against a contractor engaged in constructing a building by a teamster for personal injuries from being thrown from his team owing to the defective condition of an inclined temporary roadway down which he was driving in delivering stone in the cellar of the building in process of construction, there was evidence that the plaintiff was driving two horses attached to a stone gear, that in using the same roadway on four previous days and twice on the morning of the accident the plaintiff had

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found it safe, that on the occasion of the accident he was carrying a load of three stones weighing five or six tons, that he stopped his team on the opposite side of the street, waiting for orders, until a man whom he had seen giving directions on the lot during the three or four days preceding the accident told him to "come on," as he had been told to do on all the previous occasions when he delivered stone on the lot, that he drove across the sidewalk and saw that a piece had been cut off the end of the roadway, making a hole which went down like a flight of steps, that his horses were walking but he did not stop them because they could not hold the load, that he was standing on his team as he drove in and when he reached the cut his forward wheels went down, and he was injured. *Held*, that there was evidence for the jury of due care on the part of the plaintiff; *also*, that it could not be said that the plaintiff assumed the risk of the accident and the maxim *volenti non fit injuria* had no application. *Power* v. *Beattie*, 170.

73. In an action against a contractor engaged in constructing a building by a teamster for personal injuries from being thrown from his team owing to the defective condition of an inclined temporary roadway down which he was driving in delivering stone in the cellar of the building in process of construction, there was evidence that since the last time that the plaintiff had driven over the temporary roadway a cut had been made in it so as to make it dangerous to drive a heavily loaded team over it, that in using the same roadway on four previous days and twice on the morning of the accident the plaintiff had found it safe, that on the occasion of the accident he stopped his team on the opposite side of the street, waiting for orders, until a man whom he had seen giving directions on the lot during the three or four days preceding the accident told him to "come on," as he had been told to do on all the previous occasions when he delivered stone on the lot, that thereupon he drove down the roadway and the accident occurred. The plaintiff was unable to identify the man who told him to come on. It appeared that the defendant employed a foreman and a sub-foreman, both of whom were upon or about the premises at the time of the accident. Both of these men testified that they did not call to the plaintiff to come on. It did not appear that any workman other than those of the defendant were in or about the cellar. *Held*, that there was evidence for the jury of negligence on the part of some one for whose acts the defendant was responsible in inviting the plaintiff to drive down the roadway without informing him that its condition had been changed for the worse since the last time he used it. *Ibid.*

Action by helper under carpenter injured while nailing new stringers on rotten planks in covering vat in tannery and stepping on stringer, see *ante*, 27, 28.

Action by workman employed in construction of sewer for injuries due to part of apparatus used falling upon his head, see *ante*, 9–11.

Action by man employed to watch at night an unfinished temporary wooden building for injuries from building collapsing upon him in unusually severe gale, see *ante*, 22.

Action by administrator for death of employee of building contractor due to

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employee's falling through open floors becaus . slipping of foot of pole which he was assisting in moving, see *ante*, 3–5.

Where violation of R. L. c. 104, § 44, requiring temporary floorings to be laid during construction of iron or steel framed buildings was not evidence of negligence, although plaintiff fell through open floors, because violation was not cause of accident but merely condition under which it occurred, see *ante*, 29.

In a Building.

Action by girl employed in workshop for injury resulting from her falling into obvious hole in floor near place where employees got drinking water, see *ante*, 24, 25.

Action by servant of tenant of building injured by starting of freight elevator, involving rights of plaintiff as licensee and of person starting elevator as servant of subtenant, see *ante*, 68.

Action by customer against proprietor of room for sale of meats, for injury from being struck by heavy refrigerator door pushed against him by employee of proprietor, see *ante*, 63, 64.

Defective Chain.

Action by administrator of deceased employee of defendant injured by falling of iron column due to hoisting chain breaking because of alleged defect caused by improper welding of link by smith under same employer, see *ante*, 16–18.

Action by boy seventeen years of age working in stone quarry and injured by stone falling upon him because of defect in hoisting chain due to overheating in welding, see *ante*, 13–15.

Opening in Sidewalk.

Action by letter carrier against brewing company for injuries due to plaintiff's falling through opening in sidewalk from which bulkhead had been removed by defendant's employees alleged to have been negligently left unguarded, see *ante*, 59–60.

Of Manufacturer of Dangerous Article.

74. A workman in a factory who is injured by the bursting of a defective emery wheel bought by his employer in the open market cannot recover from the manufacturer of the wheel unless he shows that the manufacturer knew of the defect in the wheel when he sold it. It is not enough for him to show that the manufacturer sold the wheel in the open market without exercising reasonable diligence to discover whether it was defective. *Lebourdais* v. *Vitrified Wheel Co.* 341.

In Stone Quarry.

Action by boy of seventeen working in stone quarry and injured by stone falling upon him because of defect in hoisting chain due to overheating in welding, see *ante*, 13–15.

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Violation of Statute or Ordinance.

Whether violation of ordinance of city requiring one extending electric wires to procure permit from superintendent of wires is negligence, see *ante*, 65.

Whether violation of R. L. c. 104, § 44, by building contractor is negligence making him accountable for death of employee who was caused to fall through open flooring by slipping of foot of gin pole which he was assisting to adjust, see *ante*, 29.

In a Factory.

Action by inexperienced boy nineteen years of age for injuries due to defect in spreader on sawing machine in box factory, see *ante*, 19.

One employed to run machine for trimming heels in shoe factory assumes risk of accident caused by "veneering" being harder than usual, see *ante*, 26.

Of Physician.

Actions against physicians containing counts for libel, for slander, for false imprisonment and for negligence in making examination as to sanity, where motions of plaintiff to have verdicts in his favor for nominal damages on count for negligence set aside were denied rightly, see PRACTICE, CIVIL, 16–19.

Runaway Horse.

Negligence of driver when driving back to employer's stable in leaving team standing unattended so that horse ran away renders employer liable to one injured thereby, see AGENCY, 2–3.

In Use of Watercourse.

Action by owner of ice pond against railroad company which, in constructing embankment mile and half above pond injured plaintiff's crop of ice by causing particles of fine clay to be held in suspension in water which flowed into pond, see WATERCOURSE, 1.

Causing Death.

See *ante*, 3, 16–18, 20, 29, 30, 58.

Res ipsa loquitur.

75. If a person is injured by the sudden starting of an electric car, where the cause of the starting is wholly a matter of conjecture and it might have occurred without fault or negligence on the part of the company operating the car, the doctrine of *res ipsa loquitur* has no application. *Curtin* v. *Boston Elevated Railway*, 260.

Falling on head of man at work in construction of sewer of iron buffer suspended on rod of Carson trench machine can be in itself evidence of negligence, see *ante*, 9.

Evidence merely of unexplained sudden movement forward of electric car not sufficient to support contention that company operating car was negligent, see *ante*, 34.

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Negligence (*continued*).

Fact that chain which in good condition would sustain load of thirty-five hundred pounds broke under load of eighteen hundred pounds when there was no sudden or unusual strain upon it warrants finding that it was defective, see *ante*, 16.

Intervening Negligence of Third Person.

Action for personal injuries by employee of one of two contractors on same work can be maintained against negligent contractor, although negligence of employee of other contractor also contributed to injury, see *ante*, 70, 71.

As Bar to Action for Conversion.

No such negligence as to bar action of tort for conversion is to be imported from delay of plaintiff for two years in making demand from person who cashed check payable to plaintiff for plaintiff's special agent, who had no authority to indorse it, and then collected check from plaintiff, agent having embezzled proceeds and plaintiff having been diligent in searching for him, see BILLS AND NOTES, 4.

NEW TRIAL.

See PRACTICE, CIVIL, 16–22.

NEXT FRIEND.

Acts of next friend of infant plaintiff with regard to agreement for judgment for plaintiff for reasonable sum fairly made, signed by next friend and filed in court held binding upon infant, see JUDGMENT, 2.

NOTICE.

Notice to employer by employee under R. L. c. 106, § 75, not required in action for injury from defect in ways, works or machinery of defendant, because liability exists at common law, see NEGLIGENCE, 2.

Notice to judgment creditor by poor debtor of his intention to deliver himself up for examination is prerequisite to proper performance by debtor of conditions of recognizance bond, see POOR DEBTOR, 1, 2.

Notice of assignment of claim in pending action against city for work done and materials furnished left at office of city clerk to be recorded with assignments of future earnings held not to make invalid subsequent payment of judgment by city in good faith to assignor, see ASSIGNMENT, 1.

NUISANCE.

1. A landowner cannot acquire by prescription a right to maintain a public nuisance. *Hynes* v. *Brewer*, 435.

2. If a landowner maintains a retaining wall and a grading of his land which cause surface water to collect and to overflow upon a sidewalk and a cross walk of a highway creating a dangerous accumulation of ice there, he is none the less liable for an injury caused by such nuisance because

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when he acquired the land the retaining wall and the grading already were upon it and both the wall and the surface of the ground have remained without change for fifty years. *Hynes* v. *Brewer*, 435.

3. A landowner has no right to maintain a retaining wall and a grading of his land which cause surface water to collect and to overflow upon a highway so as to create a nuisance by a dangerous accumulation of ice, and if he does so he is liable to a traveller on the highway who in the exercise of due care is injured by a fall caused by such accumulation. *Ibid.*

4. In an action by a woman for injuries from falling on ridges of ice on a highway caused by the freezing of water accumulated by a retaining wall and grading on land of the defendant alleged to be a nuisance, if it appears that the plaintiff was walking on a cross walk of a public highway at a reasonably slow pace, that she was looking ahead as she walked, that she had no reason to expect one side of the street to be more dangerous than the other and that she wore rubbers, and she testifies that on account of her physical condition at the time she was taking greater care than she otherwise would have done, the fact that she could see ice at the place where she fell as well as on other sidewalks in that vicinity is not conclusive against her, and she is entitled to go to the jury on the question of her due care. *Ibid.*

OFFICER.

Action for trespass against officer who under writ authorizing him to attach goods and estate of defendant closes for eighteen hours lunch room maintained night and day by defendant, after which defendant gives bond to dissolve attachment, see TRESPASS, 2.

OPTION.

Action on contract to take shares in corporation organized to manufacture and sell certain patented article, containing option to purchase or not after receiving legal opinion as to value of patent, involving question whether determination not to purchase was communicated to treasurer of corporation, see CONTRACT, 14, 15.

PARTNERSHIP.

Infant may avoid executory contract of partnership and recover back money paid thereon, see INFANT.

Bill in equity maintained by one against his former partner to restrain interference with good will sold to plaintiff by defendant and for accounting by defendant for damages to plaintiff from defendant's acts of interference, see EQUITY JURISDICTION, 3.

Where executor of deceased member of partnership, in which it was agreed that on death of partner his interest should remain in business for two years, agrees under seal with surviving partner as to amount of testator's interest which is still used as capital of firm, such amount is taxable in hands of executor, see TAX, 2.

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PAUPER.

Infant paupers committed to and supported in School for Feeble-Minded are not insane persons, see INSANE PERSON.

PAYMENT.

1. In this Commonwealth where a debtor delivers to his creditor a negotiable promissory note of himself or of another for the whole or a part of his indebtedness there is a presumption of fact that it was received in payment, which may be controlled by evidence that the creditor by accepting the note did not intend to extinguish the original debt. *American Malting Co.* v. *Souther Brewing Co.* 89.

2. If a promissory note for the price of goods is accepted by the seller in another State where the rule of evidence existing in this Commonwealth that the acceptance of a promissory note raises a presumption of fact that it was taken in payment does not prevail, but the goods are to be delivered in Boston and the note is made payable here, the rule of evidence above stated applies to the note, for the acceptance in the other State is of a contract to be performed here. *Ibid.*

3. In an action against a corporation for the price of goods sold and delivered, where the only issue is whether the plaintiff accepted from the defendant in part payment certain promissory notes of a partnership which had organized the defendant as their successor in business, if it appears that in the correspondence which resulted in the taking of the notes by the plaintiff the treasurer of the defendant made material misstatements in regard to the cost of the defendant's plant and its having been paid for, but that, being also a member of the firm which signed the notes, he believed at the time that the firm was solvent, that there was no purpose to mislead the plaintiff and that the misrepresentations did not influence the plaintiff's conduct, the plaintiff has failed to show a right to rescind his acceptance of the notes on the ground of fraud. *Ibid.*

4. In an action against a corporation for the price of goods sold and delivered, where the only issue was whether the plaintiff had accepted from the defendant in part payment certain promissory notes of a partnership which had organized the defendant as their successor in business, it appeared that the plaintiff had been desirous of retaining the corporation as a customer and, when the giving of the notes was proposed regarded the financial condition of both the partnership and the corporation as unexceptionable, that when a large sum had become overdue and the plaintiff demanded payment, the defendant offered by letter the notes of the partnership "to settle everything due to the present moment, if acceptable," that the plaintiff replied by letter "that we would be pleased to receive notes from you, with interest, for the overdue amounts . . . and if you wish would be pleased to accept your notes for everything shipped you so far, having same run on stipulated time of contract," that the subsequent correspondence disclosed a similar course of dealing as to

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accruing indebtedness, and that in at least one instance the plaintiff returned an invoice receipted as paid and promised that other invoices should be receipted similarly. *Held*, that this evidence justified a finding by the trial judge, who heard the case without a jury, that the plaintiff agreed to accept the notes of the partnership in settlement of the open account payable when the letters were written and of any account that might become due for future deliveries of goods. *American Malting Co.* v. *Souther Brewing Co.* 89.

Where payment of judgment was made in good faith by city to one who, before payment, assigned claim in action then pending for work done and materials furnished and assignee left assignment at office of city clerk to be recorded with assignments of future earnings, payment discharges city, see ASSIGNMENT, 1.

PERPETUITIES.

See DEVISE AND LEGACY, 12.

PHOTOGRAPHS.

Rulings as to admission in evidence in action for personal injuries of photographs of injured portion of plaintiff's person, see EVIDENCE, 8–10.

PLEADING, CIVIL.

Declaration.

1. Where a declaration contains two counts alleging false representations whereby the plaintiff was induced to make a contract in writing, of which a copy is annexed, and also a third count, alleged to be for the same cause of action, for money had and received, with a bill of particulars annexed containing numerous items made up on the basis of an oral agreement alleged to have been made at a date two days earlier than the date of the agreement in writing referred to in the first and second counts, but not referring to the agreement, the third count is not bad on demurrer, as the allegation that it is for the same cause of action as the other counts does not incorporate the agreement in writing as a part of the third count, and under that count it is open to the plaintiff to prove the oral agreement on which it is based in case the agreement in writing is not proved. *Farquhar* v. *Farquhar*, 400.

Answer.

2. Whether in an action on a contract the defence that the contract is invalid is open under an answer containing only a general denial, here was not considered because the contract sued upon was held to be valid. *Worcester* v. *Worcester & Holden Street Railway*, 228.

Where defendant in answer in action on contract in writing for sale of goods which plaintiff warrants sets up damages from breach of warranty and judgment is rendered for plaintiff, defendant cannot afterwards bring action for breach of warranty, see JUDGMENT, 3.

In action by contractor against owner on building contract which provides

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that, if contractor fails to finish work and owner does so, contractor shall recover only balance that amount due on contract at time contractor ceased work exceeds expense to owner of finishing work, claim for allowance to owner of such expense need not be set up in answer in recoupment, but defence is good under answer of general denial, it being part of plaintiff's case to prove existence of such balance, see CONTRACT, 11.

Variance.

3. In an action against a contractor engaged in constructing a building by a teamster for personal injuries from being thrown from his team owing to the defective condition of an inclined temporary roadway down which he was driving in delivering stone in the cellar of the building in process of construction, the declaration alleged that the plaintiff was in the employ of one R. who had contracted with the defendant to deliver to him certain quantities of stone for building purposes on certain premises within the control of the defendant, and "that it was the duty of the defendant to provide for R. and his servants a safe and suitable way for the delivery" of the stone upon the premises within his control, which the defendant negligently failed to do. It appeared that when the accident occurred the plaintiff was employed by R. to carry stone from a railroad station to the lot upon which the building was being constructed by the defendant, but there was no evidence of a contract between the defendant and R. *Held*, that the word "delivery" when read in connection with the other language of the declaration should not be confined to a delivery under a contract with the defendant, but included any transfer of possession of the stone from R. through the agency of the plaintiff to the defendant with the defendant's consent, and that a person engaged in such delivery was rightfully on the premises in control of the defendant and was entitled to a reasonably safe place in which to make the delivery or to have a reasonable opportunity to determine whether to make it or not, so that it was not necessary for the plaintiff to prove a contract between the defendant and R. and without evidence of such a contract, upon proof of due care on the part of the plaintiff and of negligence on the part of the defendant, a verdict for the plaintiff could be supported on the declaration. *Power* v. *Beattie*, 170.

Objection of variance not raised at trial held urged too late in this court, see NEGLIGENCE, 53.

PLEDGE.

Delivery of bill of sale of personal property intended as security without delivery of property or recording of instrument conveys no title good against trustee in bankruptcy of grantor appointed in proceedings afterward instituted, see MORTGAGE, 2, 3.

POOR DEBTOR.

1. A court to which a poor debtor has delivered himself up for examination without giving any notice to the judgment creditor has no power to discharge the debtor. *Ryder* v. *Ouellette*, 24.

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2. It is not a performance by a poor debtor of the condition of his recognizance that within thirty days from the date of his arrest he delivered himself up for examination before a court of record, unless he gave notice thereof to the judgment creditor, and the refusal of the court to issue the notice does not excuse its absence. *Ryder* v. *Ouellette*, 24.
3. Under R. L. c. 168, § 65, a surety on the recognizance of a poor debtor in order to surrender his principal and exonerate himself from further liability must secure the attendance of an officer qualified to serve legal process in the case to whom the principal may be committed, as is required by R. L. c. 169, § 19, in case of a surrender by bail. *Ibid.*

PRACTICE, CIVIL.

Land Court.

For matters of practice in Land Court, see that title.

Probate Court.

For matters of practice in Probate Court, see that title.

Bastardy Proceedings.

Procecutions under bastardy act, R. L. c. 82, are in nature of civil proceedings, see BASTARDY.

Infant Plaintiff and Next Friend.

Acts of next friend of infant plaintiff with regard to agreement for judgment for plaintiff for reasonable sum fairly made, signed by next friend and filed in court held binding upon infant, see JUDGMENT, 2.

View.

1. Under R. L. c. 176, § 35, a view in a civil case can be ordered only upon the motion of one of the parties, but where the jury ask for a view and one of the parties objects to the view and the other party does not object and expresses a desire to have it, this may be treated by the presiding judge as a motion for the view and he may grant it accordingly. *Yore* v. *Newton*, 250.
2. If, after a case has been argued and the judge has given his charge to the jury and the jury have retired to the jury room for deliberation and have remained there for two hours, the jury return to the court room and ask the judge to permit them to take a view, and one of the parties makes a motion to that effect, it is not too late for the judge to grant the view and he may reopen the case for that purpose. *Ibid.*
3. If in the trial of a civil case the judge on the motion of one of the parties allows the jury to take a view, and the view is taken, followed by a verdict for the party who made the motion, but this party has not advanced the money necessary to defray the expenses of the view as required by R. L. c. 176, § 35, this is no reason for giving the other party a new trial. *Ibid.*

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Auditor's Report.

4. In the trial of an action of contract before a jury where there is an auditor's report in which he finds for the plaintiff, and there also is oral evidence, the auditor's report, although it is *prima facie* evidence, does not affect the burden of proof, which always remains on the plaintiff to satisfy the jury by a preponderance of the evidence, upon a consideration of the auditor's report and all that is contained in it together with the other evidence, that he is entitled to damages. *Morrison* v. *Richardson*, 370.

Findings by Trial Judge.

5. The findings of fact by a trial judge in a case heard by him without a jury if there is any evidence to support them must be treated as conclusive. *American Malting Co.* v. *Souther Brewing Co.* 89.

Evidence held sufficient to support finding of trial judge that promissory notes given by debtor to creditor were accepted by him as payment, and that creditor was not induced by fraud of debtor to so accept them, see PAYMENT, 3, 4.

Discretion of Court.

As to admission of evidence in rebuttal, see *post*, 6.

Conduct of Trial.

Admission and exclusion of evidence.

6. An exception to the admission by a presiding judge of evidence in rebuttal cannot be sustained unless the excepting party shows that the evidence was not admitted merely as a matter of discretion. *Morena* v. *Winston*, 378.

Rulings as to admission in evidence of photographs of injured portion of person of plaintiff in action for personal injuries, see EVIDENCE, 8–10.

Questions in cross-examination of witness testifying at trial of issues to jury as to sanity of one whose will was offered for probate held justifiably excluded although offered for purpose of contradicting witness, see WITNESS, 2.

Rulings of presiding judge at trial of action against city for injury from defect in highway as to exclusion of evidence and allowing view by jury after charge, see WAY, 3; *ante*, 1–3.

Rulings on requests for instructions.

7. A trial judge cannot be required to make a ruling based on a particular view of a portion of the evidence. *Power* v. *Beattie*, 170.

8. It is proper for a presiding judge to refuse a request for an instruction to the jury which assumes the truth of facts in dispute. *Hayes* v. *Moulton*, 157.

9. It is proper for a presiding judge to refuse a request for an instruction to the jury which, by asking him to emphasize in his charge certain portions of the evidence, attempts to put into his mouth an argument for the contention of the party making the request. *Ibid.*

10. On exceptions merely to the refusal by a presiding judge of requests for

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instructions, if the requests were refused properly, it is not open to the excepting party to argue that the instructions given by the judge might be taken in a broader sense than is consistent with the law. *Hayes* v. *Moulton*, 157.

Refusal of certain requests for instructions to jury at trial of usual issues as to validity of will held correct, see WILL, 3–5.

Ruling directing verdict.

When trial judge orders verdict for defendant and gives wrong reason, plaintiff is not entitled to new trial unless he can show ground upon which case should have been submitted to jury, see *post*, 20.

Charge to jury.

11. Under R. L. c. 173, § 80, a presiding judge has no right to tell the jury that the testimony of a witness is open to the gravest doubt. *Hayes* v. *Moulton*, 157.

12. Language of a presiding judge in his charge to a jury, which may be open to criticism, gives no ground for exception if the judge after hearing the objections to the charge finally leaves the case to the jury correctly in unmistakable language. *Morena* v. *Winston*, 378.

13. Where a presiding judge in his charge to the jury has made use of expressions which taken by themselves are objectionable, but at the close of the charge, on his attention being drawn to the matter by counsel, in the presence and hearing of the jury, assents to a correct statement of the law and adopts it, there is no ground for exception. *Morrison* v. *Richardson*, 370.

14. It is no ground of exception to the charge of a presiding judge that he suggested in his charge to the jury a possible view of the evidence which had not been contended for by either of the parties and up to that time had not been mentioned in the case, if the possible conclusion of fact suggested by the judge is warranted by the evidence. *Dusopole* v. *Manos*, 355.

Instructions to jury taken as whole are to be considered on exception to portion of charge, see *post*, 30.

Instructions contained in charge of presiding judge to jury in trial of usual issues as to validity of will, and refusal to give certain instructions requested held proper, see WILL, 3–5.

Charge of presiding judge at trial of action for slander on questions of privileged communications and of express malice held correct, see LIBEL AND SLANDER, 3.

Verdict.

15. Where a declaration contains two counts alleging false representations whereby the plaintiff was induced to make a certain contract in writing, and also a third count, alleged to be for the same cause of action, for money had and received, and at the trial of the action the presiding judge instructs the jury, that if the plaintiff fails on the first and second counts they are to consider the third count, and says "if we find that you report your verdict on the third count, by your silence on the other counts, we

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shall infer that your verdict is favorable to the defendant on the first and second counts," and if the jury return no verdict on the first or the second counts but return a verdict for the plaintiff on the third count, which upon exceptions to the rulings of the presiding judge is set aside by this court, the new trial granted on sustaining the exceptions will not be limited to the third count, as the jury may have rendered no verdict on the first and second counts for the reason that they failed to agree on those counts. *Farquhar* v. *Farquhar*, 400.

Verdict for plaintiff as to defendant's liability may be retained by him although he excepts as to assessment of damages and his exceptions are sustained, see *post*, 21.

Rulings of judge who presided at trial of actions against physicians, containing counts for libel, for slander, for false imprisonment and for negligence in making examination of plaintiff as to sanity, in denying motions of plaintiff to set aside verdicts for nominal damages on counts for negligence on ground of inconsistency held correct, see *post*, 16–19.

New Trial.

16. If different parts of a verdict are inconsistent with one another so that they cannot stand together it is the duty of the presiding judge to set it aside and to grant a new trial. *Luſkin* v. *Hitchcock*, 231.

17. A verdict for a plaintiff giving him only nominal damages should not be set aside on motion of the plaintiff on the ground that it was wrong on the question of the defendant's liability and should have been for the defendant, as the plaintiff is not aggrieved by this and the defendant does not complain. *Ibid.*

18. In actions against two physicians for alleged negligence in making an examination of the plaintiff and certifying that he was insane, verdicts for the plaintiff giving him only nominal damages should not be set aside on motion of the plaintiff merely because there was evidence which would have warranted verdicts for substantial damages, if there also was evidence which would warrant a finding that the damages were insignificant, if not merely nominal. *Ibid.*

19. In actions by the same plaintiff respectively against two physicians with declarations containing like counts for libel, for slander, for false imprisonment, and for alleged negligence in making an examination of the plaintiff to determine whether he was insane, it appeared that the defendants had signed a certificate that in their opinion the plaintiff was insane, and that this caused his arrest and his detention for a few hours. There was testimony that the defendants' examination of the plaintiff occupied only from seven to ten minutes. The jury returned verdicts for the defendants on the counts for libel, slander and false imprisonment, and reported that they were unable to agree on the counts for negligence without further instructions, which being given by the judge, they returned verdicts for the plaintiff on the counts for negligence but gave him only nominal damages. The judge had instructed the jury in substance that to return verdicts for the defendants on the counts for false imprisonment

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they must find that the plaintiff was insane and that his detention was justifiable, and that on the counts for negligence if they found that the defendants were negligent in making their examination and that their negligence was injurious to the plaintiff, they could give the plaintiff such damages as they believed him to have suffered by the defendants' wrongful acts. The plaintiff moved for a new trial on the ground that the verdicts were inconsistent. The judge refused to grant a new trial, and the plaintiff alleged exceptions. *Held*, that under the instructions of the judge the jury could have found that, although the plaintiff was insane and was not entitled to recover for libel, slander or false imprisonment, the examination was made hastily and negligently, but that, as the plaintiff suffered no actual damages, the verdict should be for a nominal sum, and that these findings were not contradictory or inconsistent, so that there was no ground for interfering with the exercise of the discretion of the presiding judge in denying the motion for a new trial. *Lufkin* v. *Hitchcock*, 231.

20. If a trial judge makes a general ruling that a plaintiff cannot recover and orders a verdict for the defendant, for which he gives a wrong reason, the plaintiff is not entitled to a new trial unless he can show some ground upon which his case should have been submitted to the jury. *Cushing* v. *Smith Iron Co.* 310.

21. Where in an action of contract the plaintiff obtains a verdict but excepts to the rulings of the presiding judge as to the assessment of damages, and his exceptions are sustained, he may retain the advantage of his verdict on the question of liability, and the new trial granted to him will be confined to the question of damages. *Morrison* v. *Richardson*, 370.

22. The provision in § 15 of R. L. c. 82, known as the bastardy act, after providing that upon the trial of the complaint the issue to the jury shall be whether the defendant is guilty or not guilty, that "If the jury find him not guilty, the court shall order him to be discharged," and that "the verdict in either case shall be final," first was enacted in St. 1785, c. 66, § 2, when under a statute long since repealed the parties in civil actions and the defendant in criminal cases had a right to a second trial upon the facts if they were dissatisfied with the verdict, and never was intended to take away the power of the presiding judge to set aside a verdict and grant a new trial in bastardy proceedings. Whether the statutory provisions in regard to petitions for writs of review apply to such proceedings, *quaere*. *Corcoran* v. *Higgins*, 291.

Question of jurisdiction of court to grant motion for new trial can be raised at any stage of proceedings at second trial, see JURISDICTION, 1.

Ruling refusing to grant new trial where, at their own request and on motion of one party not objected to by other, jury were allowed to take view after charge and two hours' deliberation, and where moving party did not advance necessary expenses according to R. L. c. 176, § 35, held correct, see *ante*, 1–3.

In action where declaration contains three counts and jury make no finding on first two but make finding for plaintiff on third, new trial ordered after rescript will not be limited to third count although judge presiding at trial

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told jury that finding by them on third count and silence as to other two would be interpreted as finding for defendant on first two counts, see *ante*, 15.

Entry of Judgment.

Acts of next friend of infant plaintiff with regard to agreement for judgment for plaintiff for reasonable sum fairly made, signed by next friend and filed in court held binding upon infant, and judgment goes into effect first Monday of following month under R. L. c. 177, § 1, although clerk's entry is erroneous, see JUDGMENT, 1, 2.

Writ of Review.

Whether petition for writ of review would lie in bastardy proceedings under R. L. c. 82, § 15, see *ante*, 22.

Appeal.

23. An appeal to the full court from a judgment of the Superior Court under R. L. c. 173, § 96, brings before this court only matters of law apparent on the record. *Hicks* v. *Graves*, 589.

24. On an appeal to the full court from a judgment of the Superior Court under R. L. c. 173, § 96, the stenographer's report of the evidence in the Superior Court is not a part of the record of that court and is not brought before this court by the appeal. *Ibid.*

Appeal from Land Court, see LAND COURT, 2-7; SUPERIOR COURT, 2.

Appeal from Probate Court, see PROBATE COURT, 1, 2.

Exceptions.

25. The admission of immaterial evidence which could not have harmed the excepting party will not support an exception. *Lewis* v. *Brotherhood Accident Co.* 1.

26. In a case which is before this court on exceptions the correctness of a ruling of the trial judge to which no exception was taken is not open for consideration. *George N. Pierce Co.* v. *Casler*, 423.

27. The exclusion of a competent question is no ground for exception if the fact sought to be established by the answer to the question afterwards is proved and is assumed in dealing with the case. *McCafferty* v. *Lewando's French Dyeing & Cleansing Co.* 412.

28. The exclusion of a competent question gives no ground for exception if the fact sought to be established by the answer to the question sufficiently appears and this court holds that the evidence warranted a finding for the excepting party on the issue to which the fact pertained. *Farrell* v. *B. F. Sturtevant Co.* 431.

29. Whether a proceeding against a public officer for his removal from office on charges of misconduct is a "civil cause" within the meaning of R. L. c. 173, § 106, giving a right to take exceptions, *quaere*. *Dow* v. *Casey*, 48.

30. On an exception to a particular portion of the charge of a presiding judge, this court will consider all of the charge which appears by the record, to determine whether the instructions to the jury taken as a whole were correct on the point to which the exception relates. *Sullivan* v. *Rowe*, 500.

31. In an action for oral slander in charging the plaintiff with larceny,

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where the defence set up is that the charge was a privileged communication made in good faith, the defendant upon the argument of exceptions after a verdict for the plaintiff cannot raise the point that the definition of express malice given by the presiding judge was wrong if none of the rulings asked for by the defendant contained a definition of express malice and he took no exception to this part of the judge's charge. *Crafer* v. *Hooper*, 68.

82. If in an action for personal injuries the defendant objects to the admission of certain evidence and it is admitted by the judge subject to the defendant's exception, and, after a charge by the judge to which the defendant takes no exception, the jury return a verdict for the plaintiff, in the argument by the defendant of his exception to the admission of the evidence, he cannot take the ground that the judge in his charge to the jury suggested an erroneous bearing of the evidence and enlarged its proper scope. *Ahearn* v. *Boston Elevated Railway*, 350.

No exception to admission of evidence in rebuttal will be sustained unless it is shown that evidence was not admitted as matter of discretion, see *ante*, 6.

No ground for exception to charge to jury where, at close of charge, presiding judge assents to correct statement of law and adopts it, in presence and hearing of jury, see *ante*, 13.

Under R. L. c. 100, § 4, no exception lies to rulings of judge of Superior Court on review by him of charges against member of licensing board of city and of evidence submitted thereunder to the mayor and findings thereon by him, see SUPERIOR COURT, 3.

PRACTICE, CRIMINAL.

Bastardy Proceedings.

Proceedings under bastardy act, R. L. c. 82, are in nature of civil, not criminal, proceedings, see BASTARDY.

Confession of Defendant.

1. *Semble*, that in this Commonwealth a person may be convicted of a crime upon his extra-judicial confession freely and voluntarily made, without corroborative evidence, and that such a case should be submitted to the jury for them to determine from all the circumstances, including the nature of the offence, how much if any weight shall be given to the confession. *Commonwealth* v. *Killion*, 153.

2. In the trial of an indictment for having accepted a bribe from a certain person while serving on a jury in a will case, the evidence principally relied on by the Commonwealth was of confessions made by the defendant, the fair import of which could have been found to be that a bribe was given to the defendant for the purpose of inducing him to vote for rendering a verdict against the validity of the will. There was independent evidence tending to show that the defendant was a juror in the will case, that the person from whom the defendant confessed that he received

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the bribe had been employed in the case on behalf of the contestants to look up witnesses and jurors and to assist otherwise in the preparation of the case, and that the verdict was in favor of the contestants so that the defendant must have voted as he confessed to having been bribed to vote. *Held*, that there was corroborative evidence in support of the confessions of the defendant, which, although in itself wholly insufficient to support a conviction, tended to confirm the truth of what the defendant had said. *Commonwealth* v. *Killion*, 153.

Testimony of Accomplice.

3. At the trial of an indictment for receiving stolen goods knowing them to have been stolen, in which the persons who stole the goods had testified as witnesses, the defendant asked the judge to state to the jury that it was not safe to convict upon the uncorroborated testimony of accomplices and to advise the jury to acquit unless their testimony was corroborated upon some material point. The judge refused this request, but instructed the jury that they should consider the testimony of the accomplices with the utmost care and scrutiny unless they found it to be corroborated by other testimony on some point material to the case and further stated that they well might hesitate to convict unless there was such corroboration. *Held*, that the defendant had no ground for exception. *Commonwealth* v. *Brennor*, 17.
4. At the trial of an indictment for receiving stolen goods knowing them to have been stolen, in which the persons who stole the goods had testified as witnesses and there was ample corroborative evidence of the theft, the defendant excepted to the refusal of the presiding judge to rule that there was no testimony which corroborated that of the accomplices upon any material point. *Held*, that one of the material points was that the goods had been stolen and therefore that the request was refused rightly, it not being open to the defendant to argue that what he meant by "some material point" was something connecting the defendant with the crime with which he was charged. *Ibid.*
5. At the trial of an indictment for receiving stolen goods knowing them to have been stolen, with two counts relating respectively to two lots of goods stolen from the same place on successive days, each lot having been stolen by three persons, of whom only two were the same, all of the persons who stole the goods testified as witnesses, and the person who joined in stealing the goods described in the first count but who had nothing to do with stealing the goods described in the second count, testified to transactions of the defendant relating to the goods described in the first count which were evidence of the defendant's guilty knowledge and intent in receiving the goods described in the second count and also tended to show a plan of action between the defendant and the two other persons who joined in stealing both lots of goods for the disposal of the goods stolen by them. The defendant excepted to the refusal of the presiding judge to rule that there was no testimony which corroborated that of the accomplices on any material point. *Held*, that, assuming that the judge and counsel both understood that corroboration upon some material

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point meant evidence tending to connect the defendant with the crime with which he was charged, and that such corroboration must be other than the testimony of another accomplice, yet the request, which was applicable to the whole case, was refused properly, as the testimony of the witness not concerned with the theft described in the second count was such corroboration in regard to the offence described in that count. *Commonwealth* v. *Brennor*, 17.

Exceptions.

Charge of judge presiding at trial of one indicted for receiving stolen goods as to weight to be given uncorroborated testimony of accomplice of defendant, and refusal to charge that it was not safe to convict on such testimony and that defendant should be acquitted held correct, see PRACTICE, CRIMINAL, 3.

PRESCRIPTION.

Landowner cannot acquire by prescription right to maintain public nuisance, see NUISANCE, 1, 2.

Obstruction for more than forty years of part of private right of way belonging to owners of land abutting on way by one of such owners held not to give him rights superior to others, see WAY, 1.

PROBATE COURT.

Jurisdiction.

Bill in equity to enforce trust created under terms of will and to correct certain acts of trustee as to payment of distributive shares held rightly brought, accountings to be settled later in Probate Court, see EQUITY JURISDICTION, 16.

Decree.

When Probate Court has decreed distribution of estate to certain persons and administrator has made such distribution without negligence, and it afterwards appears that distribution was ordered to wrong persons and former decree is revoked, new decree should order distribution to right persons but should not require administrator to take further action or impose upon him any liability, see EXECUTOR AND ADMINISTRATOR, 3, 4.

Appeal.

1. The statement of objections to a decree of the Probate Court, which by R. L. c. 162, § 10, is required to be filed with an appeal to give a single justice of this court jurisdiction to try the case, is not to be construed with the strictness which would be applied to a pleading at common law. It is enough if it indicates clearly the issue intended to be raised. *Codwise* v. *Livermore*, 445.
2. On an appeal from a decree made by a single justice upon an appeal from a decree of the Probate Court, where the justice heard the case

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upon evidence introduced before him including the report of an auditor appointed by the Probate Court, and no part of the evidence is before this court except the report of the auditor, and no findings of fact have been filed, the decree of the single justice must be affirmed if he had jurisdiction to make it. *Codwise* v. *Livermore*, 445.

Case involving duties of guardian *ad litem* appointed with reference to accounts of administrator and his raising questions for this court, see GUARDIAN; and effect of allowance of account of administrator showing payments of distributive shares, see EXECUTOR AND ADMINISTRATOR, 1.

RAILROAD.

1. A work train distributing ties and sand for repairing the roadbed of a railroad is not a freight train within the meaning of R. L. c. 111, § 200, requiring that every freight train shall have a brakeman upon the last car. *Bacon* v. *New York, New Haven, & Hartford Railroad*, 489.
2. The fact that a work train of a railroad company is being put upon a side track and that when this has been done its engine and crew are to be used in making up an extra freight train does not make the work train a freight train while it is being put upon the side track. *Ibid.*

Action for injuries to person in employ of railroad company, see NEGLIGENCE, 23.

Liability of railroad company in actions for personal injuries and death, see NEGLIGENCE, 55–58.

Degree of care required of common carrier of passengers toward passenger, see CARRIER.

Rights of railroad as to construction of clay embankment on stream which fed an ice pond a mile and a half below, see WATERCOURSE.

Under R. L. c. 111, § 267, railroad corporation is not liable for causing death of person walking or being on its road contrary to law or to reasonable regulations of corporation, see NEGLIGENCE, 58.

Facts that train was being run faster than allowed by regulations of railroad commissioners and that fences were not maintained by railroad company on both sides of railroad as required by R. L. c. 111, § 120, not evidence of negligence of railroad company in action by one whose horse while standing near track was frightened by passing freight train, see NEGLIGENCE, 55–57.

RECEIVER.

Suit in equity to enforce statutory liability of directors of street railway company under R. L. c. 112, § 19, can be maintained although property of corporation is in hands of receivers appointed by United States court and that court has not authorized suit, corporation not being necessary party to suit, and receivers assenting, see EQUITY JURISDICTION, 15.

RECEIVING STOLEN GOODS.

Questions as to proper weight to be given uncorroborated testimony of accomplices of one indicted and on trial for receiving stolen goods, and as to

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whether there was evidence corroborating testimony of accomplices, see PRACTICE, CRIMINAL, 3–5.

RECOGNIZANCE.

Surety on recognizance of poor debtor is not exonerated from liability by debtor's surrendering himself for examination within thirty days of arrest without previously having given notice to creditor of his intention to do so, nor by surety's surrendering debtor unless he first has secured attendance of officer qualified to serve civil process to whom debtor may be committed, see POOR DEBTOR, 1–3.

RES INTER ALIOS.

Statements of trustee in trustee process in answer to interrogatories propounded to him by plaintiff held not to be *res inter alios* nor hearsay at trial of issues between plaintiff and claimant under R. L. c. 189, § 82, see TRUSTEE PROCESS, 1, 2.

RES IPSA LOQUITUR.

See NEGLIGENCE, 9, 16, 34, 75.

RES JUDICATA.

See JUDGMENT, 3, 4.

RULES OF COURT.

The principle of Common Law Rule 45 of the Superior Court held to apply to exceptions taken to orders in equity proceedings, see EQUITY PLEADING AND PRACTICE, 4.

SALE.

Price.

Party to contract of sale in writing cannot contradict it as to price to be paid, see CONTRACT, 1.

By Sample.

1. Where one agrees to buy a stipulated amount of a kind of coal called "river anthracite" from a dealer who tells him that he buys this kind of coal from men who dredge it from a river and that he sells it as he buys it, and the seller exhibits to the buyer a specimen of river anthracite, saying that it may run a little better or a little worse than the specimen, and on the next day the seller writes to the buyer that he is sending by express a sample of the river anthracite coal, saying "it may run a little better, or a little worse, we take it as we get it and so ship it," and afterwards writes "the sample sent you is about an average, you may judge from it the percentage of sticks, stones, etc. in it," the sale can be found not to be a sale by sample, so that, although the coal delivered is inferior to

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the specimen exhibited or to that afterwards sent, if it is river anthracite and is merchantable the seller can recover the agreed price; and a statute of another State where the sale was made relating to sales by sample does not apply to the transaction. *Cox* v. *Andersen*, 136.

When Title passes.

2. Where a buyer has ordered merchandise which is to be shipped to him by rail, and the seller delivers the merchandise on board the cars at the shipping point consigned to the buyer as directed, the title passes and the buyer owes to the seller the price agreed upon. *Cox* v. *Andersen*, 136.

Warranty.

Where defendant in answer in action on contract in writing for sale of goods which plaintiff warrants sets up damages from breach of warranty and judgment is rendered for plaintiff, defendant cannot afterward bring action for breach of warranty, see JUDGMENT, 3.

No implied warranty that article sold by manufacturer in open market is not dangerous to use on account of defect, and manufacturer is not liable for injury to employee of purchaser caused by its use unless he knew of defect when he sold it, see NEGLIGENCE, 74.

Of Good Will.

One selling good will of business thereby agrees not to set up competing business which will derogate from good will sold, see GOOD WILL.

Bill in equity maintained by one against his former partner to restrain interference with good will sold to plaintiff by defendant and for accounting by defendant for damages to plaintiff from defendant's acts of interference, see EQUITY JURISDICTION, 3.

Sale absolute on Face shown to be Mortgage.

Sale and conveyance of land by deed absolute on its face may be shown by assignee through mesne conveyances of grantor to have been made as security and intended as mortgage, see EQUITY JURISDICTION, 4.

SAVINGS BANK.

Where savings bank accounts are transferred by owner before his death to himself as trustee for beneficiaries named, there being no delivery of possession of books, and owner continuing to draw interest on accounts for own use, those named as beneficiaries acquire no title to accounts, see TRUST, 3.

SEAL.

How and when seal may be affixed, see BOND, 1, 3, 4.

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SET-OFF.

In action by contractor against owner on building contract which provides that, if contractor fails to finish work and owner does so, contractor shall recover only balance that amount due on contract price at time contractor ceased work exceeds expense to owner of finishing work, allowance to owner of such expense is not by way of set-off or of recoupment, and plaintiff to recover must show excess due to him, see CONTRACT, 11.

SEWER.

Money paid city of Boston under protest upon assessment for sewer construction made in 1898 under St. 1891, c. 323, and acts in amendment or addition thereto and not reassessed under St. 1902, c. 527, may be recovered, see TAX, 1.

SLANDER.

See LIBEL AND SLANDER.

SMALL LOANS ACT.

Under R. L. c. 102, § 53, if there is no expense of making and securing loan secured by mortgage of household furniture on which interest is eighteen per centum or more per annum, that fact must be stated in mortgage to make it valid, see MORTGAGE, 1.

SNOW AND ICE.

See ICE AND SNOW.

SPECIALTY.

See DEED.

STATUTE.

Under R. L. c. 8, § 4, the rules as to the meaning to be given certain words in construing statutes established by § 5 of the same chapter are not to be followed if their observance would involve a construction inconsistent with the manifest intent of the Legislature, and words and phrases are to be construed according to the common and approved usage of the language except that technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in the law are to be construed according to such meaning. *Chapin* v. *Lowell*, 486.

Constitutionality, and effect as to rights of owners of land abutting on highway affected, of provisions of St. 1901, c. 455, and of general law relating to street railways, as to crossing under and changing grade of highway by Boston and Worcester Street Railway Company, see BOSTON AND WORCESTER STREET RAILWAY COMPANY, 1, 2.

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Provision in St. 1902, c. 349, as to service of process upon foreign corporation by leaving copy of petition at place where business is carried on, in matter of petition by collector of taxes of city against such corporation, delinquent in payment of tax, is reasonable and valid and was not superseded or repealed by provisions of St. 1903, c. 437, see CORPORATION, 3.

St. 1905, c. 288, as to full report by judge of Land Court which shall be *prima facie* evidence in Superior Court on appeal, held to relate to procedure as to evidence and to apply to appeal entered in Superior Court after statute went into effect, although original petition was entered in Land Court before statute went into effect, see LAND COURT, 6.

Where violation of R. L. c. 104, § 44, requiring temporary floorings to be laid during construction of iron or steel framed buildings is not evidence of negligence, although plaintiff fell through open floors, because merely condition under which accident occurred, see NEGLIGENCE, 29.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES CITED AND EXPOUNDED.

See page 729.

STREET RAILWAY.

1. Since the enactment of St. 1898, c. 578, the board of aldermen of a city or the selectmen of a town in granting a location to a street railway company cannot impose a condition that the company shall at all times maintain the pavement between its rails and tracks and for a space of eighteen inches outside thereof in good order and repair. *Worcester* v. *Worcester & Holden Street Railway*, 228.

2. Whether under St. 1898, c. 578, § 13 (R. L. c. 112, § 7), the board of aldermen of a city in granting a location to a street railway company may not impose a condition that if in the construction of the tracks of its railway it shall become necessary in the judgment of the city engineer to widen the wrought part of, change the grade of or make general or specific repairs upon the whole or any portion of the streets where the tracks are laid, such work as the city engineer may direct shall be done at the expense of the railway company, *quaere*. *Ibid.*

3. In July, 1901, the board of aldermen of a city in granting a location to a street railway company imposed a condition that the company should at its own expense and cost pave with block paving between the rails and tracks, and for a space eighteen inches outside thereof, and should maintain such pavements at all times in good order and repair. The street

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commissioner and the mayor in behalf of the city made an agreement with the street railway company that on a certain street to which the requirement applied it would be better for every one concerned to have macadam used instead of block paving outside the rails, that the city should do the work of macadamizing and that the railway company should pay for it a stipulated price. The city did the work in accordance with the agreement and brought an action of contract against the railway company for the stipulated price. *Held*, that, irrespective of the validity of the condition imposed by the grant of location, the contract was a valid one which the parties had a right to make, and, even if the authority of the street commissioner and the mayor to represent the city had been disputed, which it was not, the bringing of the action was a ratification equivalent to an original authority. *Worcester* v. *Worcester & Holden Street Railway*, 228.

4. The owner of land abutting on a public way, which is injured by reason of a change of grade of the way made in the construction of the railway of a street railway company in accordance with its grant of location from the selectmen of a town, has no remedy in tort against the street railway company or the contractor employed by it to do the work of construction. Whether, in case the abutting land is cut off by the change of grade from all proper access to the highway so as to be rendered incapable of reasonable improvement, the landowner may not be entitled to relief in a proper form of remedy seasonably sought, *quaere*. *Hyde* v. *Boston & Worcester Street Railway*, 80.

Under general law relating to street railways and St. 1901, c. 455, selectmen of town on line of Boston and Worcester Street Railway Company have power to grant location to that company authorizing it to cross under public way at right angles and for this purpose to raise highway seven feet, see BOSTON AND WORCESTER STREET RAILWAY COMPANY, 1, 2.

What degree of care is required of common carrier of passengers toward passenger, see CARRIER.

Liability of street railway company in actions for personal injuries and death, see NEGLIGENCE, 20, 21, 32–46.

Liability of directors of street railway company under R. L. c. 112, § 19, considered in case of bill in equity brought to enforce such liability, see EQUITY JURISDICTION, 9–15.

Consideration of what is warning proper to be given to persons using city street by city engaged in repairing it and street railway company obliged by law to repair certain portions of it, see WAY, 5–7.

SUNDAY.

See LORD'S DAY.

SUPERIOR COURT.

1. In a prosecution under R. L. c. 82, known as the bastardy act, the Superior Court has the power to set aside a verdict of not guilty and order a new trial. *Corcoran* v. *Higgins*, 291.

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2. Upon an appeal to the Superior Court from the Land Court on the issue whether the omission of the testator, under whose will the petitioner claims title to the land which he seeks to have registered, to provide in his will for his children was intentional under R. L. c. 135, § 19, the Superior Court has jurisdiction to decide this question of fact. *Woodvine* v. *Dean*, 40.

3. In the provisions of R. L. c. 100, § 4, that a member of a licensing board of a city, if removed by the mayor, may apply to the Superior Court for a review of the charges, of the evidence submitted thereunder and of the findings thereon by the mayor, that "the court, after a hearing, shall affirm or revoke the order of the mayor removing such commissioner, and there shall be no appeal from his decision," the word "appeal" is used in a general sense which includes all proceedings for a revision by a higher court, and there is no right of exception to the rulings of the judge, whose decision is final. *Dow* v. *Casey*, 48.

Interpretation of St. 1904, c. 448, as to proper method of perfecting appeal from Land Court to Superior Court, and as to whether appeal lies where no evidence was introduced in Land Court, and party appealing was defaulted or nonsuited, see LAND COURT, 2, 3, 5; constitutionality of provisions of § 8 limiting trial by jury to certain issues considered, see *ibid.* 4.

SUPREME JUDICIAL COURT.

Appeal to Supreme Judicial Court from judgment of Superior Court under R. L. c. 173, § 96, does not bring stenographer's report of evidence before this court, see PRACTICE, CIVIL, 23, 24.

SURETY.

Conditions under which surety on poor debtor's recognizance bond becomes exonerated from liability by surrender of debtor or by debtor's surrendering himself for examination, see POOR DEBTOR, 1–3.

TAX.

Assessment for Benefits.

Delay of city in making assessment of betterments resulting from construction of sewer held not to give plaintiffs right of action for damages under contract which gave such right when betterments were assessed, plaintiffs not having requested that assessment be made, see CONTRACT, 20.

Sewer Assessment.

1. An assessment for sewer construction in the city of Boston made in 1898 under St. 1891, c. 323, and acts in amendment or addition thereto, and not reassessed under St. 1902, c. 527, is void, and a sum of money paid under protest upon such an assessment may be recovered from the city of

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Boston, although the assessment was made under the same order as the assessment disputed in Harwood *v.* Donovan, 188 Mass. 487, where this court refused, in view of the laches of the petitioner and the circumstances of that case, to grant a writ of certiorari to quash the assessment. *Smith* v. *Boston*, 31.

Double Taxation.

2. Where articles of copartnership provide that on the death of one of the partners his share of the capital shall remain in the business for two years, the surviving partner paying interest thereon to the estate of the deceased partner, and, upon the death of one of the partners, the surviving partner agrees with the executor of the will of the deceased partner as to the balance due from the partnership to the testator which still is used under the agreement as part of the capital of the firm, the debt to the estate can be taxed in the hands of the executor as personal property, although this results in double taxation. *Williams* v. *Brookline*, 44.

On Property of Foreign Corporation.

Tax upon personal property of foreign corporation situated in this Commonwealth lawfully may be assessed to corporation and need not be assessed *in rem* against property itself, see CORPORATION, 2.

Constitutionality of such part of St. 1903, c. 437, § 71, as relates to assessment of tax on personal property in this Commonwealth of foreign corporation upheld irrespective of whether another part of same section with regard to collection of such tax is constitutional, two parts of statute being separable, see CORPORATION, 4.

Abatement.

3. Where the executors of a will, who also are trustees thereunder, as executors pay under protest a tax on personal property consisting of a debt acknowledged by an instrument under seal made to them as executors, and represent to the assessors that their relation to the property is wholly as executors, on a petition for an abatement of the tax it is not open to them to contend that the tax is invalid because assessed to them as executors rather than as trustees. *Williams* v. *Brookline*, 44.

Collection.

4. R. L. c. 13, § 33, in regard to the collection of taxes where the person assessed dies or becomes insolvent, which provides that "the executor, administrator or assignee" upon the receipt of any money applicable to the payment of the tax shall be liable for such tax after a demand, does not give a remedy against the assignee under a common law assignment for the benefit of creditors even if the assignor is in fact insolvent, the word "assignee" referring only to an assignee in insolvency under the statutes of the Commonwealth. *Scollard* v. *Edwards*, 77.

Provisions of St. 1902, c. 349, empowering collector of taxes of city to maintain petition to restrain foreign corporation, delinquent in payment of tax

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lawfully assessed upon its personal property in such city, from doing business in this Commonwealth, held constitutional, and provisions as to service of process upon defendant are not repealed or superseded by provisions of St. 1903, c. 437, see CORPORATION, 3, 4.

TEMPORARY FLOORING.

Where violation of R. L. c. 104, § 44, requiring temporary floorings to be laid during construction of iron or steel framed buildings is not evidence of negligence, although plaintiff fell through open floors, because merely condition under which accident occurred, see NEGLIGENCE, 29.

TOWNS.

See MUNICIPAL CORPORATIONS.

TRADE NAME.

Suits in equity to enjoin unlawful use of trade name similar to "Oriental Process Rug Renovating Company," involving among other matters procedure when damages are considered too small to warrant reference to master, see EQUITY JURISDICTION, 5, 6.

TRESPASS.

1. If an officer authorized to make an attachment after making the attachment exceeds his authority and thereby becomes a trespasser *ab initio*, the person whose goods he has attached does not waive the trespass by giving a bond to dissolve the attachment, and after doing so still has a right of action against the officer. *Walsh* v. *Brown*, 317.
2. If an officer in the service of a writ authorizing him to attach the goods and estate of a certain person enters a lunch room owned and maintained by that person and kept open night and day, and, after making an attachment of goods found therein and putting a keeper in charge, proceeds to put a lock and staple on the door and, for a period of eighteen hours, to exclude the proprietor whose goods he has attached and his servants and also customers wishing to enter, such acts of exclusion are in excess of his authority and make him a trespasser *ab initio*. *Ibid.*

TRUST.

Unperfected Trust.

1. In this Commonwealth a mere declaration of trust by a voluntary settlor, which is not communicated to the donee and assented to by him, is not sufficient to perfect a trust, especially where the property is retained by the person making the declaration subject to his own control. *Boynton* v. *Gale*, 320.

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2. A bill in equity against an administrator to establish a trust alleged that by mistake a legacy was made to the defendant's intestate absolutely which had been intended to be left to him in trust for the plaintiffs, that the intestate learning of the mistake declared that he would hold the legacy in trust for the plaintiffs and so informed the parents of the plaintiffs, who then were of tender years, and promised their parents that he would pay over the trust fund to the plaintiffs when they should come of age, that he afterwards received the legacy and invested it in bonds of the United States and informed the father of the plaintiffs of that fact and that he held the bonds in trust for the plaintiffs. On demurrer it was *held*, that the bill set forth no trust. *Boynton* v. *Gale*, 320.

Savings bank account.

3. One having deposits in more than fourteen savings banks caused seven of them to be transferred to himself in trust for certain persons respectively named as beneficiaries and in most of the cases executed an assignment in writing to himself as trustee for the beneficiary named. He kept all of the bank books representing these deposits in his own possession while he lived and drew out the interest for his own use. When he died these books were found in his trunk among his other effects. During his lifetime he made oral statements tending to show that at his death he intended the books to go to the persons respectively named in them as beneficiaries. He had transferred to another person seven other savings bank accounts, in each case delivering the bank book and never having it again in his possession or drawing anything from the account. *Held*, that these facts warranted a finding that there was no perfected gift of any of the accounts represented by the bank books retained by the deceased, and that no trust was created, so that the title to these accounts remained in the deceased at the time of his death. *Coolidge* v. *Knight*, 546.

Trust under Will.

Bill in equity to enforce trust created under terms of will and to correct certain acts of trustee in making alleged wrongful distribution, see EQUITY JURISDICTION, 16, 17.

TRUSTEE PROCESS.

1. In an action, begun by trustee process, where a claimant of the fund in the hands of the trustee has appeared under R. L. c. 189, § 32, which permits him to "allege and prove any facts which have not been stated nor denied by the supposed trustee," on the trial of the issue between the plaintiff and the claimant, the statements contained in the answers of the trustee to interrogatories propounded to him by the plaintiff under c. 189, § 11, are not *res inter alios* nor to be treated as hearsay, and so far as they are material must be laid before the jury. *Hubbard* v. *Lamburn*, 398.
2. At the trial of an action begun by trustee process, where the defendant and another appear under R. L. c. 189, § 32, as claimants of the fund in the hands of the trustee which they allege to have been their partnership

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property, and the only issue for the jury is whether the claimants have maintained their claim to the fund, it is error for the presiding judge to exclude the answers of the trustee to interrogatories propounded to him by the plaintiff under c. 189, § 11, containing statements of acts and conduct of the defendant from which it can be argued that he was the only person interested in the alleged partnership. *Hubbard* v. *Lamburn*, 398.

UNLAWFUL INTERFERENCE.

1. A corporation may be enjoined from conspiring with others to interfere unlawfully with the performance of a contract and may be held liable in damages for such interference in the same way and to the same extent that a natural person may be. *Aberthaw Construction Co.* v. *Cameron*, 208.
2. In a suit in equity by a contractor to enjoin the officers and members of a labor union from conspiring to compel the plaintiff, by threats of causing a strike of his employees, to employ only union men in certain work constituting part of the construction of a church under a contract between the plaintiff and a corporation, called a board of directors, which was one of the defendants, and for the assessment of damages caused by the illegal acts of the defendants, it appeared that the defendants other than the corporation conspired in the manner charged in the bill before they were aided by the defendant corporation, that this defendant was informed by one of the other defendants that a general strike was proposed if the plaintiff continued to employ a certain non-union workman, that the members of the board, which constituted the defendant corporation, had an interview with the plaintiff in which they requested him either to discharge the non-union workman or to procure employment for him elsewhere or to permit them to do so, and that they did this to avoid a general strike which they deemed probable if the workman was permitted to remain and which if it occurred would delay the completion of the church, that about a week later the defendant corporation voted to request the plaintiff to cease work as it had decided to finish the building in another way, and communicated this vote to the plaintiff, and that the plaintiff was ejected from the church and prevented from continuing the performance of his contract. *Held*, that the vote of the defendant corporation and its communication to the plaintiff, followed by the breaking of the contract, warranted a finding that the defendant corporation participated in an unlawful conspiracy to compel the plaintiff to employ only union workmen, and that in pursuance of such conspiracy the defendants caused a breach of the contract between the plaintiff and the defendant corporation without any just cause or lawful provocation; but that a finding was warranted that the defendant corporation did not participate in such conspiracy by the previous interview of the members of the board with the plaintiff, which was advisory only and was not intended to aid in the coercive measures or active interference adopted by the other defendants. *Ibid.*
3. In a suit by a contractor to enjoin the officers and members of a labor union from conspiring to compel the plaintiff, by threats of causing a

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strike of his employees, to employ only union men in certain work constituting part of the construction of a building under a contract between the plaintiff and the owner of the building and for the assessment of damages caused by interference with the plaintiff's performance of his contract, a temporary injunction issued and thereupon the plaintiff completed his contract before the case was ripe for a final decree. The case came before a single justice upon a master's report which was founded upon the plaintiff's bill and dealt only with the unlawful acts of the defendants in connection with the contract described in the bill. The master found for the plaintiff and the single justice ordered that the master's report be confirmed. The plaintiff in applying for a final decree asked for a permanent injunction restraining the defendants from any interference in the future in case the plaintiff in the performance of other contracts should employ non-union workmen. The justice ruled that the injunction should apply only to the contract set forth in the bill, which had been completed by the plaintiff, and to no other work. He reported the case to the full court, stating in his report that all questions of pleading were waived, and also stating that such decree was to be entered on the master's report as law and justice required. *Held*, that the ruling confining the decree to the issues heard and passed upon by the master and the single justice was correct. *Aberthaw Construction Co.* v. *Cameron*, 208.

USAGE.

See CUSTOM.

VARIANCE.

See PLEADING, CIVIL, 3; NEGLIGENCE, 53.

WAIVER.

Where officer in attaching goods and effects of defendant exceeds authority and becomes trespasser *ab initio*, defendant by giving bond to dissolve attachment does not waive trespass, see TRESPASS, 1, 2.

Waiver by Commonwealth of right to terminate holding by charitable corporation of property in excess of amount allowed by its charter, see CORPORATION, 1.

WARRANTY.

Where defendant in answer in action on contract in writing for sale of goods which plaintiff warrants sets up damages from breach of warranty and judgment is rendered for plaintiff, defendant cannot afterward bring action for breach of warranty, see JUDGMENT, 3.

Covenant in deed of warranty against claims of all persons claiming by, through or under grantor is not broken by existence of easement for laying and maintaining sewer taken by city by right of eminent domain before deed was given, see DEED.

No implied warranty that article sold by manufacturer in open market is

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Warranty (*continued*).

not dangerous to use on account of defect, and manufacturer is not liable for injury to employee of purchaser caused by its use unless he knew of defect when he sold it, see NEGLIGENCE, 74.

WATERCOURSE.

The proprietor of an ice pond cannot maintain an action of tort at common law against a railroad company for injury to his crop of ice during one season from particles of fine clay, which were washed down from the filling of an embankment made by the defendant in the construction of its road a mile and a half above the plaintiff's pond, being held in suspension in the waters of a brook that fed the pond, where it appears that the embankment was built under authority of law and was of a proper slope for its height and width, and that the kind of clay used for filling, while not so good as pure gravel, was in common use for railroad embankments and made a good solid embankment, and that there is likely to be more or less wash from such embankments during the first season, and where it does not appear that the attention of the agents or servants of the defendant ever was called to the fact that a mile and a half below the embankment the water of the brook was used for the cultivation of ice, there being nothing in the foregoing facts to show that the defendant had done any act not reasonably necessary and proper in the construction of its road under authority of law, so that the plaintiff's remedy, if any, was statutory. The question whether the railroad company as an upper riparian proprietor had not the right to make such a reasonable use of its own land, although unavoidably causing temporary injury to the lower proprietor, and therefore was not answerable in any form of action, was not passed upon. *Todd* v. *Old Colony Railroad*, 302.

WAY.

Private.

1. In a suit in equity by one abutter on a private way against another, to enjoin the defendant from obstructing the way by carts, sleds and other chattels, where the deeds creating and defining the right of way describe it without ambiguity as a private way twenty-four feet wide for the benefit of all present and future abutters thereon with the right to pass and repass at pleasure over any part of it, it is proper to exclude evidence offered by the defendant to show that for a period of nearly forty years a predecessor in title of the defendant used one half of the private way practically continuously for the piling of wood and such other uses as he saw fit to make of it. *Gray* v. *Kelley*, 533.
2. The owners in common of a tract of land laid out on it for their own convenience a private way twenty-four feet wide and five hundred and twenty-one feet long leading from a highway on which their land abutted. From time to time they made conveyances of land adjacent to this way on each side, in which they gave the respective grantees "a right to pass and repass at pleasure over any part of said private way of twenty-four feet

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wide adjoining the premises" conveyed. Thereafter the original owners of the land who laid out the way executed and caused to be recorded a declaration describing the way by metes and bounds, referring to their having laid it out previously, and declaring that they did "set apart and appropriate forever the land occupied by said way twenty-four feet wide as a private way for all the present or future abutters thereon according to our original intention." In a suit in equity by the owner of land on one side of this way against the owner of land on the other side of it, seeking to enjoin the continuous obstruction of the way by carts, sleds and other chattels, it was *held*, that the plaintiff was entitled to have the way remain at all times unobstructed throughout its entire width so that he might pass freely over any part of it. *Gray* v. *Kelley*, 533.

Construction of terms of deeds with regard to whether boundary line is at side of private way or includes way, see BOUNDARY, 1, 2.

Public.

Extent of public easement.

Original taking of land for highway includes use of highway for public travel by all reasonable devices, including crossing under it at right angles by street railway and for that purpose raising highway seven feet, see BOSTON AND WORCESTER STREET RAILWAY COMPANY, 1, 2.

Defect.

3. In an action against a city for injury to property of the plaintiff from an alleged defect in the grading of a highway of the defendant by reason of which the furniture wagon which the plaintiff was driving toppled over, the presiding judge in his discretion properly may exclude evidence that a witness had seen at the same place bales of hay fall off a team loaded with hay, barrels fall off teams loaded with barrels and wood fall off wood teams, and if the judge thinks that such evidence would lead to issues which would be likely to distract if not to confuse the jury, to take the defendant by surprise or to prolong the trial unduly, it is his duty to exclude the evidence. *Yore* v. *Newton*, 250.

4. If a traveller on a bridge which it is the duty of a city to maintain as a public highway, after waiting for a draw of the bridge to be closed and the gates at the ends of the draw to be opened, walks forward upon the sidewalk of the draw and is struck and injured by one of the gates rebounding from the fence to which it should have latched itself when thrown back, and if the accident was not caused by want of care on the part of the traveller or by negligence on the part of the gate tender in throwing back the gate but was due wholly to a defect in the latch of which the city ought to have known, this constitutes a defect in the highway, for an injury caused by which the traveller can recover from the city under R. L. c. 51, § 18. *Meaney* v. *Boston*, 396.

Action by one riding bicycle on highway in process of repair, see *post*, 5–7.

In process of repair.

5. A city or town, or a person obliged by law to repair a highway, owes the same kind of duty to travellers on bicycles as to those travelling in other

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Way (*continued*).

ways, but a person riding on a bicycle has no right to disregard a notice that a part of a street is not open to public travel by reason of repairs being made upon it merely because he can ride with his bicycle in a place where ordinary vehicles cannot go. *MacFarlane* v. *Boston Elevated Railway*, 183.

6. A city engaged in repairing one of its streets and a street railway company which is obliged by law to repair the portions of such street between its tracks perform their respective duties toward travellers on the highway if they give them proper warning to enable them to avoid the danger occasioned by the work, and this may be done by putting up signs and barriers indicating the portion of the street withdrawn from public travel by reason of the repairs being made upon it which render it for the time unfit for use. *Ibid.*

7. In actions under R. L. c. 51, §§ 17, 18, respectively against a city and a street railway company, obliged by law to repair the portions of highways between its tracks, for injuries to and the death of the plaintiff's intestate caused by an alleged defect in a highway in the space between the rails of the track of the railway company, it appeared that one of the parallel tracks of the railway and the side of the street adjoining that track were undisturbed and open for travel, while the other track was being paved with brick between the rails and the side of the street adjoining it was dug up and in process of paving by the city, that the space between the two tracks was in part dug up and was unfit for travel, that the track which was being paved had been raised a foot above the level of the street on each side, and that the paving between the rails had been completed except for three openings, each a few feet in length and filled with sand, the pavement of the track also being covered with a thin layer of sand, that at each end of the work a red flag had been set between the two tracks and there were wooden horses extending from the relaid track across the part of the street where the work was going on, indicating that this part of the street was closed for travel, but the track itself was not barred, as the rails were in place and cars were passing over them, that the plaintiff's intestate was riding on a bicycle upon the unfinished pavement of the relaid track and coming to one of the holes filled with sand was thrown upon the other track in front of an approaching car and was killed. *Held*, that there was no evidence of negligence or of failure of duty on the part of either of the defendants, they having given sufficient notice that the part of the way undergoing repairs, including the relaid track, was dangerous and was withdrawn from public travel; and *semble*, that the plaintiff's intestate in disregarding this notice and going forward on the unfinished pavement of the track without taking precautions to ensure his safety was not in the exercise of due care. *Ibid.*

Bridge.

Action against city for injury from rebounding of gate on bridge owing to defective latch, see *ante*, 4.

Change of grade.

Where street railway company changes grade of highway, acting under grant of location from selectmen of town, owner of land abutting on highway

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held to have no remedy in tort, and question as to what remedy he has discussed, see STREET RAILWAY, 4.

Constitutionality, and effect as to rights of owners of land abutting on highway affected, of provisions of St. 1901, c. 455, and of general law relating to street railways as to crossing of and changing grade of highway by Boston and Worcester Street Railway Company, see BOSTON AND WORCESTER STREET RAILWAY COMPANY, 1, 2.

Paving.

Validity of condition as to paving street along which tracks are laid imposed on street railway company by grant of location, and of contract between municipal officers and company as to such paving, see STREET RAILWAY, 1–3.

WILL.

Testator's Omission to provide for Children.

1. Under R. L. c. 135, § 19, the question whether the omission of a testator to provide for his children in his will was intentional is a question of fact. *Woodvine* v. *Dean*, 40.

Land Court, and Superior Court on appeal from Land Court, have jurisdiction to determine question of fact whether testator intentionally omitted to provide for his children in his will, on petition to try title of land devised to petitioner to exclusion of testator's children see LAND COURT, 1, 6, 7; SUPERIOR COURT, 2.

Republication.

Effect on meaning of words of will of republication of will by codicil which changes clause to be construed, see DEVISE AND LEGACY, 1.

Undue Influence and Fraud.

2. The fact, that the provisions of a will are different from the previously expressed purpose of the testator or from what such provisions would have been if the testator, besides being in the full possession of his faculties, had acted under independent advice, does not require that the will should be set aside. A testator has a right to change his mind and to select his own advisers. *Hayes* v. *Moulton*, 157.

3. A person may have sufficient capacity to make a will if let alone and yet not be of sufficient capacity to resist the pressure upon him of strong influence, and the question whether the use of such influence is lawful often may depend upon the condition of mind and body of the person upon whom it is exercised; but this does not make it improper for a presiding judge to refuse to instruct the jury that "the question of undue influence and mental incapacity cannot be separated where the testatrix was of advanced age and suffering from a disease affecting her brain and vital powers." *Ibid.*

4. At a trial of the usual issues as to the validity of a will the contestants asked the judge to instruct the jury as follows: "If it is shown that at

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the time of the execution of the will the testatrix' mind was enfeebled by age and disease, even though not to the extent producing mental unsoundness, and the testatrix acted without independent and disinterested advice, and in the presence of the beneficiary under her will, and such gift was of the whole or a large portion of the testatrix' estate, and operated wholly or substantially to deprive those having a natural claim upon her bounty of all benefit in her estate, these circumstances authorize the jury to find the will void through undue influence without proof of specific acts and conduct on the part of the party charged with exerting undue influence." The judge in his charge to the jury made it plain to them that they might infer undue influence from the facts mentioned in this request if they found these facts to be proved and chose to draw such an inference. *Held*, that this was as far as it was the duty of the judge to go. *Hayes* v. *Moulton*, 157.

5. At a trial of the usual issues as to the validity of a will, which left all the property of the testatrix to a niece who had lived with her during her last illness, the contestants, who were the excluded nephews and nieces of the testatrix, asked the judge to instruct the jury that the fact that the favored niece stood in a relation of trust and confidence to the testatrix, who asked her advice, which the niece gave to her own advantage and to the injury of all other relatives, would warrant the jury in disallowing the will. The judge refused the request. *Held*, that the refusal was right; that it was a question for the jury to determine whether and how far there was a relation of trust and confidence between the favored niece and the testatrix, that, if the jury found this fact to be as contended by the contestants, it would be a material circumstance for them to consider and they would be warranted in saying that the will should not be sustained without proof to their entire satisfaction that it expressed the real intention of the deceased, which was not the instruction requested. *Ibid.*

Sanity of Testator.

Questions in cross-examination of witness testifying at trial of issues to jury as to sanity of one whose will was offered for probate held justifiably excluded although offered for purpose of contradicting witness, see WITNESS, 2.

Validity of Bequest to Corporation beyond Amount allowed by Charter.

If property sufficient to make total holdings of charitable corporation exceed amount which it is allowed by its charter to hold is given it by will, and afterwards act of Legislature increases amount which corporation may hold so that total amount allowed exceeds amount of previous holdings plus amount of gift, Commonwealth has waived right to terminate holding and has declared gift valid, see CHARITY; CORPORATION, 1.

WIRES.

Action against electric light corporation for injury from electric light wires negligently extended by plaintiff, see NEGLIGENCE, 65–67.

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WITNESS.

Cross-examination.

1. In an action by the owner of a building against the owner of the adjoining land for negligence in digging a trench on his own land so near the party wall that the plaintiff's building settled, whereby it was damaged and its rental value diminished, the plaintiff testified that his tenant left him by reason of the injuries caused by the defendant. On the plaintiff's cross-examination the defendant was allowed to show, subject to the plaintiff's exception, that the plaintiff had demanded a large sum for damages to his property on account of the diminution of its rental value by the construction of an elevated railway in the street in front of the premises, that he made a claim against the corporation operating the elevated railway and got damages "for light, air and noise," receiving $5,100 for injury to this property and the adjoining one. *Held*, that this testimony was in the nature of an admission by the plaintiff that the rental value of his property was greatly diminished from causes other than the wrongful acts of the defendant, and that this fact properly might affect the weight of his direct testimony in which he imputed the loss of his tenant to the undesirability of his property for occupation caused by the digging of the trench; consequently that the judge in his discretion well might admit the testimony in cross-examination. *Hopkins* v. *American Pneumatic Service Co.* 582.
2. At the trial of an issue as to the sanity of a testator who executed the alleged will in a ward of a hospital when three persons were present besides the attesting witnesses, one of these persons testified that when the instrument was presented to the alleged testator he was told "This is your will giving all your property to G." (the person to whom it was given by the alleged will) and was asked whether he wanted to sign it, and that the alleged testator nodded his head and reached for a pen. He also testified that on or about the day that the will was executed he saw the alleged testator take a teacup in his hand and drink from it, and that on various occasions he had asked the alleged testator how he was, and he had answered "Pretty well." On cross-examination he was asked whether he had not said to the orderly at the hospital on the day the will was executed "That it was a shame to make that man make a will. They might as well have a dead man." The judge excluded the question. On an exception to this ruling it was *held*, that, as the witness was not qualified to express an opinion upon the sanity of the alleged testator, the only question was whether an affirmative answer to the question was admissible to contradict the previous statements of the witness and thus weaken his credibility, and that the witness's alleged statement to the orderly properly might be interpreted as a statement concerning the mental capacity of the alleged testator, which the jury erroneously might regard as affirmative evidence on that issue, and so properly could be excluded by the judge as not strictly in contradiction of the statements of the witness as to simple physical acts of the alleged testator; *also*, that the judge properly might

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Witness (*continued*).

have excluded the evidence on the ground that the alleged statement was so vague and indefinite as not to have any tendency to contradict the witness. *Gleason* v. *Daly*, 348.

Contradiction.

Evidence offered to contradict witness on material matter held properly excluded as too vague and indefinite, see *ante*, 2.

WORCESTER ART MUSEUM.

See CHARITY; CORPORATION, 1.

WORDS.

"Actions upon contracts." See *Haynes* v. *Blanchard*, 244, 247.
"Appeal." See *Dow* v. *Casey*, 48, 50.
"Assignee." See *Scollard* v. *Edwards*, 77, 79.
"Civil cause." See *Dow* v. *Casey*, 48, 50.
"Connected therewith." See *Schell* v. *Schuler*, 441, 444.
"Contracts." See *Haynes* v. *Blanchard*, 244, 247.
"Delivery." See *Power* v. *Beattie*, 170, 176.
"Expiration." See *Sutton* v. *Goodman*, 389, 394.
"Feeble-minded." See *Chapin* v. *Lowell*, 486, 487, 488.
"Freight train." See *Bacon* v. *New York, New Haven, & Hartford Railroad*, 489, 490.
"Insane person." See *Chapin* v. *Lowell*, 486, 488.
"Legal heirs." See *Holmes* v. *Holmes*, 552, 557, 558, 559.
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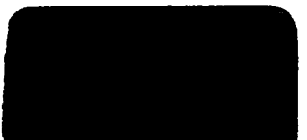

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